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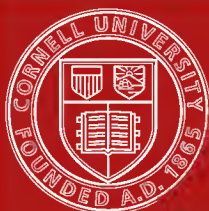
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DIGEST
OF
HOUSE OF LORDS CASES

DECIDED ON APPEAL FROM

SCOTLAND,
1709 TO 1864,

WITH

GLOSSARY OF SCOTTISH LAW TERMS.

BY

JOHN BOYD KINNEAR,

ADVOCATE, AND OF LINCOLN'S INN, BARRISTER-AT-LAW ;
AUTHOR OF "A PRACTICAL TREATISE ON THE LAW OF BANKRUPTCY," ETC.

EDINBURGH :
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PREFACE.

THE want of a complete Digest of the Reports of Scottish Appeal Cases has long been felt by the profession, and in an especial degree by those who have practised at the bar of the House of Lords. Although the several volumes of Shaw's Digest now contain references to the full series of the Scottish appeal reports, of great utility to the possessors of that work, they can scarcely be considered as precluding the advantage of a distinct publication ; for the appeal cases are there scattered through four large volumes, in the earlier of which the abstracts were prepared by different hands, and on different principles, many valuable points are omitted, and for want of cross-references, it is difficult to find many which are really included ; the English series of reports, in one or more of which the same case is often to be found, are not generally cited ; and finally, the work is practically inaccessible to the English lawyer, to whom many of the Scottish cases in the House of Lords are of value as great as if they had arisen in English courts. For these reasons, I thought myself justified in continuing the preparation of the work now submitted, even after, in the course of it, I became aware that the compilers of the last volume of Shaw's Digest intended to include Paton's reports in its references.

No one, however, can be more sensible than I am of the impossibility of attaining perfection in such a work. There are two main difficulties to be encountered. The first is the ascertaining the point actually decided ; the second in determining under which title it ought to be placed, so as to be most easily found by those who seek for it. The former difficulty is peculiarly great in the early series of House of Lords cases, from the rule of the House, not modified till the beginning of the present century, that no speeches were delivered in affirming a judgment, while, even in reversing, the speeches have often been lost. Where, therefore, a case might have turned on any one of several points, it is frequently impossible to say on which the judgment proceeded. When, indeed, the Court below distinctly embodied the grounds of its decision in the decree itself, and the House either affirmed or reversed the whole decree, I have generally, though not always, thought it safe to state all the grounds as affirmed or negatived. But where the decree was in general terms, and the affirmance or reversal equally general, I could only exercise the best of my judgment in determining, subject to every hesitation, and with such guidance as could be obtained from the arguments, or from subsequent judicial mention or exposition of the case, which point or points were really resolved. But it must be kept in view throughout that the Digest is a work of reference, and not of authority, and that the object has been to direct to the sources of the law, and to all that by analogy or inference might aid in elucidating the law, and not at all to assume to say (although, for the sake of brevity, a proposition may be often found expressed without qualification) what is really the law laid down. Thus, even after the delivery of speeches became the rule, many dicta will be found stated in the Digest which will be of infinite value to the profession, although they cannot always be taken as conclusive judgments. My object, in short, has been

in all cases to state as nearly as possible what might fairly seem to be decided, knowing that in any case the reference would be useful, and the error easily amended. With regard to the second difficulty alluded to—that of arrangement—I have endeavoured to meet it by a very copious use of cross-references from one title to another, and by an ample index. The effect of these, I trust, will be to enable the practitioner to find on any subject all that bears upon it, even though contained in a case properly falling as to its principal points under another head. Under each title the cases are arranged according to date, except when similarity of subject rendered it convenient to place some in juxtaposition.

In preparing the abstracts, I have in no instance relied on those given by the original reporters, many of which are well known to be very imperfect, and some absolutely erroneous. I have read through every report of each case in both the English and Scottish series, besides often referring to the appeal cases, a labour of which the amount may be conceived from the fact, that there are 1970 separate cases digested, different reports of very many of which are found in the various series. But as each case commonly contains more than one point of law or practice, the Digest embraces upwards of 2500 distinct abstracts, and by means of cross references furnishes direction to nearly 3000 points of law determined or considered. I cannot but trust that the bringing these into one view will be of service to the profession, even while fully conscious that I may not hope to have performed the task in a manner exempt from error.

Many of the cases being equally applicable to England as to Scotland, I have endeavoured to give some assistance in distinguishing them by printing the name of such cases in italics. I have thus pointed out not merely those which directly proceed on English principles, but those which may serve by inference

or analogy to illustrate them. Even, indeed, in the more strictly Scottish cases, of which the references are in Roman type, the English lawyer will often find matter of value to his argument. But after much consideration, I have not attempted to express any of them in English instead of Scottish law language. The result of such a procedure would be to fail to convey to the Scottish lawyer the full information which the word familiar to him would have implied, while it would have misled the English lawyer, by inducing him to suppose that the law is identical where it is only similar, and that no distinctions exist when the distinctions may happen to be material. The Glossary given at the end of the work will, I hope, afford sufficient explanation, without the danger of suggesting error.

Several cases not reported are included in the Digest. It had been my intention to give an abstract of the whole of the unreported cases, but as they are numerous, and frequently important, it seemed to me ultimately that a mere abstract would be unsatisfactory, and that it would be better to reserve a complete report of them for a supplemental volume.

It may be right to add, as a work similar in purpose was a number of years ago announced by another member of the Scottish bar, that I did not commence till after ascertaining that he had abandoned the design.

LINCOLN'S INN, *March* 1865.

ABBREVIATIONS OF REPORTS CITED.

1. APPEAL REPORTS.

Robert.	Robertson, 1 vol., 1709-1727.
Colles.	Colles's Cases in Parl., 1 vol., 1711.
Cr. & St.	Craigie & Stewart, also forming vol. 1 of Paton, 1726-1757.
P.	Paton, 6 vols., 1759-1820.
Br. P. C.	Brown's Cases in Parl., 8 vols., 1700-1800.
Dow	Dow, 6 vols., 1813-1818.
Bligh	Bligh, 4 vols., 1819-1821.
S. Ap.	Shaw's Appeal Cases, 2 vols. 1821-1824.
W. & S.	Wilson & Shaw, 7 vols., 1825-1835.
Bligh, N. S.	Bligh, New Series, 10 vols., 1827-1837.
Dow & Cl.	Dow & Clark, 2 vols., 1827-1831.
Cl. & Fin.	Clark & Finelly, 12 vols., 1831-1846.
S. & M'L.	Shaw & Maclean, 3 vols., 1835-1838.
M'L. & R.	Maclean & Robinson, 1 vol., 1839.
Robin.	Robinson, 2 vols., 1840, 1841.
S. Bell	Sydney Bell, 7 vols., 1842-1850.
H. L. Cas.	Clark's House of Lords Cases, 1847-1862.
Stu.	Stuart's Reports in Court of Session and House of Lords, 2 vols., 1852, 1853.
M'Q.	Macqueen, 4 vols., 1852-1864.

2. COURT OF SESSION REPORTS.

M.	Morison's Dictionary of Decisions.
F. C.	Faculty Collection.
S.	Shaw, 1st Series, Court of Session Reports.
D.	Dunlop & Bell, 2d Series, Ditto.
Macph.	Macpherson, 3d Series, Ditto.

ERRATA AND ADDENDA.

- Pages 35 & 42. In references to Nos. 89 and 165, *for* "Lord Douglas," *read* "Lord Dunglas."
- Page 38. In reference to No. 126, *for* "Carne," *read* "Carre."
- " 39. In No. 136, *for* "conflictory," *read* "conflicting."
- " 81. After title Authority of Judgments, insert "See also case declared to overrule a previous one, if they were not distinguishable, which was doubted, Greig v. Johnstone, 5 W. & S. 416 (1833)."
- " 82. End of title *Charity*, after "HEIR," insert "56," and *for* "TRUSTEE," *read* "TRUST."
- " 88. End of title *Building*, after "SHIPPING," insert "11."
- " 92. End of title *Errors, &c.*, *for* "LAND AGENT, 11," *read* "LAW AGENT, 12, 14."
- " 98. End of title *Crown*, *for* "PUBLIC OFFICE, 12," *read* "PUBLIC OFFICE, 1, 2."
- " 99. End of title *Damages*, after "PARTNERSHIP," delete "22."
- " 120. In reference to 55, *for* "1 S. Bell, 342," *read* "1 S. Bell, 368."
- " 123. End of title *Revocation*, *for* "FORFEITURE, 50," *read* "FORFEITURE, 15."
- " 309. End of title "SUCCESSION AND LEGACY DUTIES," insert additional cross reference "ENTAIL 202."
- " 341. Transfer No. 18, from title WRITTEN DOCUMENT to title CONTRACT, *Salary and Services*, page 88, the contract in the case not having been in writing.

N.B.—In consequence of corrections made in the numbering in passing through press, it will be found in a few instances that the case intended to be cited in a cross reference is that which immediately follows the number actually given.

For additional cross references, see also Index of Subjects, page 367.

A.S. m.

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DIGEST

OF

HOUSE OF LORDS CASES.

ABBEY.—See SANCTUARY.

ACQUIESCENCE.

1. Creditors having public notice of an alienation of their debtor's property at an undervalue, are by acquiescence barred from setting it aside. — *Thriepland v. Walsh*, 2 P. 496 (1779); *Rev. M.* 8383. *Fordyce v. Crs. of York Buildings Co.*, 2 P. 500 (1779); *Aff. M.* 8380.

2. Acquiescence only begins to run from the time when the party could have acted, and therefore the judicial purchase of an estate by a common agent may be challenged eleven years after the transaction, if the relation of common agent subsisted for that space of time. — *York Buildings Co. v. Mackenzie*, 3 P. 378 (1795); *Rev. M.* 13367.

3. In a claim made by a daughter for her share of the personalty of her father, who died thirty-six years before, when she was only one year of age; held that nothing was due to her. — *Lindsay v. Kinloch*, 3 P. 432 (1796); *Aff.*

4. Evidence of acquiescence in an excambion with the minister held to bar an heir of entail from reducing it. — *Innes v. Downie*, 6 P. 75 (1814); *Aff.*

5. Acquiescence may cure a defective execution of a legal authority, but cannot supply an authority that does not exist. — *Walker v. Weir*, 6 P. 281 (1817); *Rev. See Action*, 105—*Burgh*, 16.

6. The son of a deceased factor is not entitled to claim a commission or fee for trouble as due to his father, which the father, in the annual accounts rendered by him, had never stated as a charge. — *Boyes v. Waring*, 1 S. Ap. 121 (1822); *Aff. See Contract*, 15.

7. When a party who had in 1836, by judgment of the House of Lords, recovered overcharges from the year 1815, brought thereon an action to recover similar overcharges from 1804 to 1815; held that the demand was inequitable, and consequently to be refused. — *Dixon v. Monkland Canal Co.*, 5 W. & S. 445 (1831); *Aff. 8 S.* 826.

8. A party entitled to tolls in respect of a railway, such tolls to be payable for every ton of goods so carried, is not barred from recovering arrears in respect of goods for which the railway did not consider themselves liable, and therefore did not include in their annual statement of the amount carried, by the fact that he accepted payment of the sums yearly tendered as due under such statement, it not shewing specifically the nature of the goods carried. — *Edinburgh and Dalkeith Ry. Co. v. Wauchope*, 1 *S. Bell*, 252, 8 *Cl. & Fin.* 710 (1842); *Aff.* 1 *D.* 1151.

See BILL OF EXCHANGE, 13—BANKRUPTCY, 23—BURGH, 41—
CAUTIONER, 21—CONTRACT, 15.

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See also APPEAL—COURT OF SESSION—EVIDENCE—SHERIFF—
also MULTIPLEPOINDING—REDUCTION—&C.

I. PURSUERS.

1. It is irregular to sequester the rents of an estate at the instance of creditors who are not parties to the action in which the sequestration is granted. — *Lord Lovat v. Lady Lovat*, Robert. 355 (1721); *Rev.*

2. The Presbytery of the bounds is entitled to sue for the due administration of a charity in the name of the Kirk-Session, who were the proper parties, but who disclaimed the action. — *Mags. of Perth v. Presb. of Perth*, Cr. & St. 39 (1730); *Aff. M.* 10723.

3. The committee of an English lunatic has not, in virtue of his appointment, a title to sue in Scotland; but if the lunatic, being yet uncognosed in Scotland, grants him a power of attorney, though it narrates his own lunacy, his title will be sufficient. (Per Lord Hard-

wicke)—“The law would be the same in England.” — *Bayne v. Earl of Sutherland*, Cr. & St. 454 (1750); *Rev. M.* 4595.

4. Question whether office-bearers of a joint-stock company not incorporated can sue for the company. — *Cabbel v. Brock*, 3 W. & S. 75 (1828).

5. A company unincorporated may sue by its directors. — *Downe v. Pitcairn*, 3 W. & S. 472; 4 Bligh, N.S. 550 (1829); *Aff.* 2 S. 658.

6. Question whether one partner can sue on a contract entered into with the partnership? — *Stewart v. Gibson*, 1 Robin. 260 (1840).

7. Question whether a party can authorise another to sue in his own name, not assigning to him the right in question? — *Creighton v. Rankin*, 1 Robin. 99, 7 Cl. & Fin. 325, May (1840); 16 S. 447.

8. A pauper suing for a debt may be ordered to find security for costs, on its appearing that he had assigned the debt in security to another, and the assignee refusing to be sisted; but on obtaining a retrocession, he is not liable to find security for future costs, but may be ordered, before proceeding, to pay the expenses of the discussion occasioned by the assignation. — *Walker v. Wedderspoon*, 2 S. Bell, 57 (1843); *Aff.*

See BANKRUPTCY, 75—BURGH, 15, 27—PARTNERSHIP, DISSOLUTION OF.

II. DEFENDERS.

9. In an action to determine the bounds of a royal forest, the Lord Advocate must be made a party. — *Earl of Breadalbane v. Menzies*, Cr. & St. 146 (1735); *Rev. See Appeal*, 71.

10. A burghal parish having been erected and disjoined from the landward parish in an action by the magistrates against an heritor to have a churchyard allotted, it is necessary that the Kirk-Session of the new parish should be parties. Interlocutors reversed for defect of parties, without prejudice to the pursuers adding proper parties or commencing a new action. — *Stewart v. Mags. of Greenock*, 2 P. 486 (1779); *Rev. M.* 8019. *See Parish*, 1.

11. A landlord having by illegal means obtained possession of a farm on his estate to the prejudice of the tenant's creditors, and thereon again let it, the new tenant is entitled to be heard for his interest in a reduction of the new lease by the creditors. — *Irvine v. Valentine*, 3 P. 287 (1793); *Alt.*

12. An action of declarator and damages against a company held to be properly directed against their clerk or manager, though there was no clause in their act authorising him to sue or be sued. — *Shand v. Henderson*, 2 Dow, 519 (1814); *Rev.* 1808.

13. The surviving partner of a company cannot object that the representatives of the other partners ought to be called as co-defenders,

when the pursuer declares that none exist, unless he is prepared to state who they are. — *M'Brair v. Hamilton*, 2 W. & S. 66 (1826); *Rem.* 4 S. 24.

14. A joint-stock company may be sued by the name of its firm, with the addition of some of the names of the partners. — *Commercial Bank v. Pollock's Trustees*, 3 W. & S. 365 (1828); *Aff.*

15. A party allowed to appear as defender in an action in which decree could not go out against him, nor form *res judicata* against him, is not entitled to the costs of appearance, or subsequently, although the defender is assoilzied. — *Duke of Hamilton v. Mather*, 2 S. & M'L. 586 (1837); *Aff.* 14 S. 162.

See BANKRUPTCY, 76—DAMAGES.

Defender Abroad.

16. The owner of heritable estate in Scotland, though not residing in Scotland, may be sued in respect of an Indian transaction. — *Graham v. Henderson*, 4 P. 421 (1802); *Aff.*

17. A suit having been brought by a Scotsman by birth against two other Scotsmen by birth, in respect of transaction in America where all the parties had long resided, though the defenders had property in Scotland which was corrected on the dependance, the Court of Session held it had jurisdiction, and the House of Lords held that the point could not be reconsidered, the decision not having been appealed from at the time, and the suit having been proceeded with. — *Hyslop v. Gordon*, 2 S. Ap. 451 (1824); *Alt.*

18. A summons served on 6th July states that the defender had left the country on June last. Held that service at the dwelling-house was proper, there being no proof of the period of absence from the country. — *Creighton v. Rankin*, 1 Robin. 99, 7 Cl. & Fin. 325 (1840); *Aff.* 16 S. 447.

19. An English railway company may be sued in Scotland on arrestment, *jurisdictionis fundandæ causa*, of funds due to it by a Scottish railway company. Question, whether in case of jurisdiction so established, the remedy given can exceed the value of the funds arrested. — *London and N. W. Rail. Co. v. Lindsay*, 3 M'Q. 99 (1858); *Aff.* 18 D. 62.

20. On the death of a party for whom a mandatary has been sisted, intimation ought to be made to his representatives, and in the event of their declining to proceed with the action, the mandatary is liable for expenses up to that date. He is also liable if, on applying to be discharged, the party does not obtemper the order calling on him to sist a new mandatary. — *Cairns v. Anstruther*, 2 Robin. 29 (1841); *Aff.* 1 D. 24.

21. In an action against an heir on the passive titles, it is not necessary to call the personal representatives of the ancestor, or other heirs-portioners who are out of Scotland, and the heir may be cited, though domiciled in England and in Scotland at the time, for less than forty days. — *Irvine v. Kirkpatrick*, 2 Robin. 475 (1841); Aff. 16 S. 1200.

See BANK, 8.

III. PLEADINGS.

1. *Summons and Condescendence.*

22. A condescendence is evidence against the party of a fact confessed in the condescendence, but it does not prove in his favour a further fact which would avoid the admission. Thus it will prove non-delivery of stock to the purchaser, but not delivery to the order of the purchaser. Failure to file a special condescendence ordered amounts to confession. — *Paterson v. Ogilvie*, Robert. 499 (1724); Aff.

23. An action may proceed on a duplicate summons signeted after the first had been served, and dated after the date of the first, which it was alleged on one side had been lost, but on the other side was said to have been vitiated. — *Northland v. Cadell*, 4 P. 385 (1802); Aff.

24. A charge of fraud against the agent of the opposite party in a lawsuit, if pertinent to the case, is not to be struck out before proof. Observed, that if ultimately found impertinent and scandalous, it is worthy of consideration whether the counsel ought not to bear the costs, rather than the party. — *Robertson v. Graham*, 3 Dow, 273 (1815); Rev.

25. A remit to valutors is equivalent to a proof, and bars an amendment of the libel, but if such amendment, when offered, is not objected to, it cannot be afterwards. — *Johnstone's Trs. v. Elliot*, 2 S. Ap. 461 (1824); Aff. 1 S. 51.

26. The subsumption and conclusion being erroneously directed against Thomas, while the will was (correctly) against William, and decree went out against William, the error is not one to prevent the judgment of the House on the merits on appeal, it being stated that if the House affirmed it could remit to have the error amended, and if it reversed the error was immaterial. — *Cranfurd v. MacCormack*, 2 W. & S. 569 (1827).

27. In a prosecution for statutory penalties the title of the prosecutor must be stated as falling under the precise terms directed by the statute, and it must be proved, and the offence must be proved by strict rules of evidence. — *Black v. Campbell*, 5 Dow, 23 (1817); Rev. See 34.

28. An heir of provision seeking to reduce, *ex capite lecti*, a deed executed by a previous heir of provision, must libel himself as heir to the party whose deed is to be reduced, not as heir to the original author

of the destination, and the objection may be taken even after a proof has been led on the merits, and cannot at that stage be remedied by a supplementary summons. — *Harford v. Harvey*, 2 Bligh, explained; *Cogan v. Lyon*, 4 W. & S. 391 (1830); Aff. 5 S. 92.

29. The inhabitant of a burgh claiming a right of servitude, as existing in favour of the burgh, must claim it as inhabitant or owner, to the effect of having his right tried by a jury, and cannot found upon the possession of persons whom he only states as having property in the burgh similarly situated to his own. — *Duke of Hamilton v. Aikman*, 6 W. & S. 64 (1832); Alt. 8 S. 943.

30. A summons having libelled the pursuer's title as tacksman of salmon fishings, he cannot enlarge it by stating himself in the condescendence to be also proprietor of lands with a right of salmon fishing; and though his title to sue is sustained, it may still be found that he has no title to obtain decree. — *Mackenzie v. Houston*, 5 W. & S. 422 (1831); Aff. 8 S. 117.

31. After answers were lodged to a condescendence, in which the defender fully set forth the facts on which he relied on the merits, held that it was too late for the Court to dismiss the action on the ground that the pursuer had set forth no relevant ground of action. Observations on the disadvantage of pleading matter of evidence, and the impropriety of the Court considering matter of evidence in deciding upon the relevancy. — *M'Donald v. Mackie*, 5 W. & S. 462 (1831); Rev. 8 S. 686.

32. An heiress of entail, served and infeft, is entitled to sue for penal rent which would have fallen under executry, on amending her summons by adding the words, "and only child of her said father." — *Lawson v. Ogilvy*, 7 W. & S. 397 (1834); Aff. 10 S. 531.

33. A condescendence ought not to set out a statute, nor the argument or interpretation suggested for it, as matter of fact. — *Henry v. M'Ewan*, 7 W. & S. 411 (1834).

34. In an action on a statute which requires "wilful corruption, or oppression, or culpable negligence, out of which real injury has arisen," to be libelled, it is enough to libel in the summons the acts complained of as being "irregular, illegal, wilfully oppressive, and malicious," observed that "cruel" would be equivalent to "oppressive." — *Stuart v. Kelly*, 7 W. & S. 343 (1834); Aff. 11 S. 287.. See Damages.

35. When a summons must libel malice, &c., it is unnecessary that the condescendence should repeat the charge, if it set forth facts which support it. — *Stuart v. Kelly*, 7 W. & S. 343 (1834); Aff. 11 S. 287.

36. An action, concluding for a partner's concurrence in a deed produced, cannot be amended so as to call for his concurrence in a corrected deed. — *Stewart v. Gloag*, M'L. & R. 721 (1839); Aff. 16 S. 86.

37. A party who has appeared in an action in a Sheriff Court cannot object, after decree, that his name, though mentioned in the statement in the summons, was omitted in the conclusion, there being a conclusion against a class of individuals of whom he was one, and a second summons, remitted to but not conjoined with the first, having called him by name. — *Creighton v. Rankin*, 1 Robin. 99 ; 7 Cl. & Fin. 325 (1840) ; Aff. 16 S. 447.

38. A pursuer of a reduction of a sale under a trust-deed being only libelled as heir of entail, and the entail being by a different deed, the summons is not relevant and cannot be amended. — *Munro v. Paul*, 1 Robin. 246 (1840) ; Aff. 15 S. 780. See 32.

39. A declarator, concluding to have the whole obligations, &c., set forth in the summons, declared binding on the defender, will support a decree in the pursuer's favour in respect of some of the obligations ; but a summons narrating a variety of obligations, including some on which the pursuer makes no claim, and concluding for declarator on the whole, so far as unperformed, will be inept. — *Tailors of Aberdeen v. Coutts*, 1 Robin. 296 (1840) ; Rev. 13 S. 226.

40. The Court ought not to permit an amendment of a summons which consists in converting a matter stated merely as incidental narrative into one of the grounds of the conclusions. — *Scott v. Curle*, 2 Robin. 317 ; Aff. 2 D. 348.

41. A pursuer is never bound to state the minimum of what he is to be found entitled to, but under a larger claim may recover any smaller relief which is consistent with and grows out of the facts stated. (Per Lord Cottenham.) — *Bremner v. Campbell*, 1 S. Bell, 311 (1842) ; 1 D. 618.

42. A supplemental summons claiming interest on the sum claimed in the principal summons, after expiry of the period at which it could have been amended, is incompetent, and the irregularity is not covered by the defender in a reclaiming note praying the Court to alter the Lord Ordinary's interlocutor giving interest. — *Union Canal Co. v. Carmichael*, 1 S. Bell, 316 (1842) ; Rev.

43. A condescendence appended in a summons cannot by revision merely be made to support a plea rendered necessary by a decision given pending the suit, but must be amended to have that effect. — *M'Ewan v. Campbell*, 2 M'Q. 499 (1857) ; Aff. 16 D. 117.

44. Observations on the loose form of averring facts in Scotland, and on the use of rhetorical or metaphorical expressions. — *National Exchange Co. v. Drew*, 2 M'Q. 103 (1855) ; 12 D. 950. See 96, 103—Appeal, 35.

2. Defences.

45. The tenor of writs in the defender's hands being libelled, and

not acknowledged or denied in the defence, held confessed. — *Cuming v. Pantoun*, Robert. 582 (1726) ; *Aff.*

46. Before the question of a title to exclude can be gone into, the pursuer must first establish that on the facts he states he has a title to sue. — *Fullerton v. Hamilton* (Bargany), 4 P. 175 (1801) ; *Alt. M.* 11171.

47. A defender having pleaded that the written document by his agent on which he was sued was given without his authority, but having gone on to state a particular want of authority in regard to one part of it, the Court is justified in taking the question of authority as established, and in going into the construction of the document. — *Earl of Mansfield v. Scott*, 6 W. & S. 277 ; 1 Cl. & Fin. 319 (1833) ; *Aff.* 9 S. 780.

48. It is not correct to deny generally the statements in a condescendence in so far as inconsistent with the answer ; each statement ought to be specifically admitted or denied. Pleas in law ought to contain only allegations of matters in law, and not be mixed up with matters of fact ; a statement of fact is not converted into a plea in law by a reference to authorities being appended. — *Pattison v. Allen*, 7 W. & S. 26 (1833).

49. Defences really on the merits, though called by the party, and in the interlocutor of the Lord Ordinary, dilatory, will be treated as on the merits, and may be appealed from without leave. — *Clyne's Trs. v. Clyne*, M'L. & R. 72 (1839) ; 15 S. 911.

50. A party who has pleaded a plea in bar must insist upon it either before trial, or as matter of law at the trial, and if he does not, he cannot urge it afterwards. — *Campbell v. Campbell*, 1 Robin. 1 ; 7 Cl. & Fin. 162 (1840) ; *Aff.* See 64—Damages, 17.

51. A dilatory defence is one which merely objects irregularity or error in time or form of bringing the action ; a peremptory defence is one which shows that the plaintiff has no case at any time or in any form. — *Geils v. Geils*, 1 M'Q. 36, 3 H. L. Ca. 280 (1851).

3. Defence of *Lis Alibi* and *Res Judicata*.

52. An action being commenced in Scotland on the same ground on which a bill had been filed in Chancery in England, the defence of *lis alibi* is repelled on the pursuer abandoning the suit in Chancery and producing a decree dismissing his bill. — *Cuming v. Pantoun*, Robert. 582 (1726) ; *Aff.*

53. Circumstances suggesting collusion will prevent a judgment from becoming pleadable as *res judicata*. — *Lord Arbuthnot v. Spottiswood*, Cr. & St. 284 (1740) ; *Rev.* See 5 Br. Sup. 709, for subsequent procedure. See also Entail, 41.

54. A decree finding that a deed was a marriage-contract, and barred a subsequent entail, pronounced in an action of reduction of such sub-

sequent entail by the heir of the marriage, does not form *res judicata* in an action at the instance of creditors holding a subsequent charge on the estate. — *Sinclair v. Threipland*, 3 P. 113 (1789) ; *Rev.*

55. A suspension and interdict does not form *res judicata* to an action of declarator of the right in question. — *Earl of Wemyss v. Hope*, 3 P. 487 (1796) ; *Aff.*

56. The House having found that a certain obligation, being of a moveable nature, must affect the *jus relictæ*, this does not form *res judicata* as to any question raised by the discovery of a bond of corroboration of the debt which formed the subject of the obligation. — *Graham v. Maxwell*, 2 Dow, 314 (1814) ; *Rev.*

57. The decision of 1801, in the Bargany case, declared to have been only in reference to the action as then libelled, and not to preclude Mrs Fullarton from bringing a fresh action, in which, instead of founding on the nullity of the deed of 1747, she founded upon it as forming her own preferable title, and remit to consider that question on the merits. — *Fullarton v. Hamilton*, 1 S. Ap. 265 (1822) ; *Rem.*

58. A judgment of the House in a former case explained not to have been intended to form *res judicata* in a certain branch of the question. — *Maule v. Maule*, 2 W. & S. 451 (1826) ; *Rev.* 2 S. 26.

59. Decree given against a defender, under minute of consent, forms *res judicata*, though he afterwards alleges that his consent was given in consequence of erroneous advice by his solicitor as to his legal rights under the law of England, by which they were regulated. — *Macallister v. Macallister*, 4 W. & S. 142 (1830) ; *Aff.* 5 S. 871.

60. An interlocutor assoilzieing from an action "as laid," on the ground that the facts averred were not relevant and sufficient, is not *res judicata* in a new action laid on different grounds. — *Gillespie v. Russel*, 3 M'Q. 757 (1859) ; *Aff.* 19 D. 897.

See ARBITRATION, 25—CROWN, 5—FOREIGN JUDGMENT.

IV. RECLAIMING.

61. The House, in special circumstances, allowed a party to reclaim in the Court of Session, although the reclaiming days had expired. — *Sawyer v. Earl of March*, Cr. & St. 479 (1750) ; *Rev.* M. 16757.

62. The Court may, on a reclaiming note against an interlocutor of the Lord Ordinary ordering further proof, find the proof unnecessary, and decern on the merits. — *Hunter v. George*, 7 W. & S. 333 (1834) ; *Aff.* 10 S. 604.

63. A reclaiming note praying to be reponed against a decree by default, must be marked by the clerk as lodged within the time limited for reclaiming, it being different from an application to be reponed against a decree in absence. Question as to competency of appeal

without leave from an interlocutor refusing to reponc. — *Fraser v. Gordon*, W. & S. 559 (1835); Aff.

64. A reclaiming note against an interlocutor of the Lord Ordinary sustaining objections to the relevancy of one of two conjoined actions, brings both before the Inner House, and enables it, if repelling the objection, to give decree on the merits. An objection to the relevancy might be made after defences and condescendence lodged. — *Burnes v. Pennell*, 6 S. Bell, 541; 2 H. L. Ca. 497 (1849); Aff. 10 D. 689. See 143.

V. RES NOVITER VENIENS.

65. A deed which had been in the party's possession cannot be alleged as *noviter veniens*. — *Dixon v. Grahame*, 5 Dow, 266 (1817); Rev.

66. Deeds recorded cannot be admitted after decree as *res noviter veniens*. — *Grahame v. Grahame*, 1 W. & S. 354 (1825); Aff. 1 S. 35.

67. An allegation that a witness after examination has made a statement shewing partiality is *res noviter*, and unless admitted to proof as such by interlocutor, cannot be received under an interlocutor allowing a proof on protest for reprobators. — *Anderson v. Gill*, 3 M'Q. 180 (1858); Aff. See Evidence, 4, 19.

VI. CONSIGNATION.

68. Consignation may be ordered in an accounting before the objections of the party in possession of the funds to the judgment, finding him liable in payment, are disposed of. — *Brown v. Paterson's Trs.*, 4 W. & S. 57 (1830); Aff. 5 S. 204.

69. An order to consign is a matter entirely discretionary with the Court. Held that it ought not to have been made against English trustees for creditors on the debt having been constituted by action in Scotland, but the pursuer having failed as yet to make out a good title to receive payment. — *Findlay v. Donaldson*, 5 S. Bell, 105 (1846); Rev.

VII. INCIDENTAL PROCEDURE.

70. In a competition respecting lands and dignities, it is desirable (per Lord Eldon) that if possible the question of the dignities should be decided first (p. 383), but held that a question of law on the construction of a deed should be decided before entering into evidence of propinquity, it being clear that the title lay amongst the parties competing. — *Ker v. Innes (Roxburgh)*, 5 P. 320 (1810).

71. No objection to the non-authentication of the process in closing the record can be entertained after the verdict. — *Bain v. Whitehaven Ry. Co.*, 7 S. Bell, 79; 3 H. L. Ca. 1; 12 D. 829 (1850).

72. A remit *ob contingentiam* is competent, although both the parties in the two cases are not the same, nor the question the same, and though the first case has been carried by appeal to the House of Lords. — *Cleland v. Clason*, 7 S. Bell, 153 (1850); Aff. 11 D. 601.

73. The record being opened on remit, and new pleas added, but no new interlocutor pronounced, the parties agreed at the hearing on appeal to hold the former interlocutors as if pronounced in the new record. — *Edinburgh and Glasgow Ry. Co. v. Mags. of Linlithgow*; 3 M'Q. 691 (1859).

74. The Court will properly refuse to conjoin actions where one of the parties alleges that such a course would prejudice his defence. — *Wauchope v. North British Ry. Co.*, 4 M'Q. 348 (1862); Aff. 23 D. 119.

VIII. PROOF.

I. *Productions on by Commission.*

75. After the time for reporting a proof by commission has expired, and a diligence has been obtained for examination of such as had refused to appear, it is incompetent, although circumduction has not passed, to apply for a new commission to examine others, or to re-examine any already examined, unless on *res noviter*, or such as had been disclosed by the proof as important and were not known before, or on fraud. — *Gordon v. Brodie*, Robert. 259 (1720); Aff. See Appeal, 12.

76. An examination of a Scottish peer, and party to a suit, allowed to be taken in London, although the other party declared that from poverty he could not attend out of Scotland. — *Robertson v. Earl of Kinnoul*, Robert. 394 (1721); Aff.

77. It was usury to include in the capital sum of a bond usurious interest for the first term; and on this being alleged, the creditor was ordered to confess or deny the facts, and commission was granted to the Chief Justice of England to examine witnesses and inspect the creditor's books and take excerpts. Pending the inquiry the creditor was ordered to transfer to the Clerk of Court the collateral securities granted, and till this was done the Clerk was ordered to retain the promissory-note sued on. — *Brand v. Cumming*, Robert. 511 (1725); Aff.

78. A widow having brought an action on her marriage-contract against her son, is bound to produce her counterpart of the contract, defender pleading that she had failed to implement her own obligations, and that his counterpart of the contract was filed in a Chancery suit in England. — *Duchess v. Duke of Hamilton*, Robert. 604 (1727); Aff.

79. Evidence taken in virtue of a commission and diligence granted by the Court for the examination of witnesses under a submission, was admitted by the Court of Session to be read in a subsequent action on the

same grounds, and an appeal against the order was dismissed, on the ground that the appellant had acquiesced for seven years. — *Cunningham v. Chalmer*, Cr. & St. 267 (1740); Aff. M. 14044. See Evidence, 2, 16.

80. A haver destroying documents called for after he has been cited is guilty of high indiscretion, and will be, even if not a man of business and acting inadvertently, visited with expenses of a petition and complaint against him. A party destroying documents before their production is called for may act indiscreetly, but is not deserving of punishment. — *Robertsons v. Alexander*, 6 W. & S. 1; 2 Dow & Clark, 312 (1831); Rev. 8 S. 1055.

81. Diligence will not be allowed for the recovery of writs alleged to contain a qualification of an absolute conveyance, without specification, by date or otherwise, of the precise writ sought to be recovered. — *Robertson v. Pattinson*, 5 S. Bell, 259 (1846); Aff. 6 D. 945.

82. A document which, though not part of the case, is a material part of the evidence founded on, and is in the possession of the pursuer or his agent, must be produced before the record is closed, but the Court may order its production for the purpose of evidence in the course of the proof. — *Anderson v. Gill*, 3 M'Q. 180 (1858); Aff. See 65, 66.

83. A diligence to recover documents may properly be refused till the relevancy of the action has been sustained. — *Orr v. Glasgow, Airdrie, &c. Ry. Co.*, 3 M'Q. 799 (1860); Aff. 20 D. 327. See 62—Bill, 12.

2. Judicial Remit.

84. The Court is entitled to look at the grounds stated in the report as those on which the party to whom a judicial remit has been made has formed his judgment. — *Dixon v. Campbell*, 2 S. Ap. 175 (1824); Aff.

85. After a judicial remit of consent, neither party can claim a trial by jury of the same question. — *Fraser v. Maitland*, 2 S. Ap. 37 (1824); Aff. See 25.

86. After consent to a judicial remit, a party is barred from leading evidence. — *Dixon v. Monkland Canal Co.*, 1 W. & S. 636 (1825); Alt. 1 S. 145. See 25.

3. Oath of Party.

87. A party acquitted in the Court of Justiciary is still liable in damages in the Court of Session, and may be compelled to depone on reference to his oath; and failing his appearance to depone, the pursuer may give his oath in supplement. The granting commission to take oath of reference of a party out of the country, is discretionary with the Court. — *Gordon v. Gordon*, Cr. & St. 60 (1731); Aff.

88. On a reference to the oath of two partners as to certain facts respecting a bond due to one of them only by name, but alleged to be for the firm, it is competent to take the oath of only the creditor named, the other partner being abroad. — *Earl of Traquair v. Burrows*, 6 P. 99 (1815); Aff.

89. Evidence of intercourse at a date long prior to the period alleged, does not amount to *semiplena probatio* warranting the oath in supplement. A stepdaughter was an inadmissible witness under the old law of evidence. — *Humphry v. Aitken*, 1 S. Ap. 3 (1822); Aff.

90. A party having deponed, on a reference to his oath, that the sum sued for as having been lent to him, was really given under circumstances which warranted the inference that it was not intended as a loan but to effect a collateral purpose, the oath was held negative. — *Hamilton v. Richmond*, 1 W. & S. 35 (1825); Aff. 2 S. 143.

91. A pursuer having in his oath of calumny refused to answer whether a particular sum, which alone was in dispute, was in his belief still due to him, but having sworn generally that he believed money to the extent sued for was due him, the oath held negative as to the particular sum. — *Duguid v. Mitchells*, 1 W. & S. 203 (1825); Aff. 3 S. 96.

92. An appeal as to a sum of L.1, 4s. and costs, amounting to L.30, dismissed, not on the ground of the smallness of the sum, but on the merits, the debtor having, in a reference to oath, deponed that he knew the sum had been paid by his father, as he had settled with him on that footing, although no note of the payment appeared in the factor's accounts. — *Cooper v. Hamilton*, 2 W. & S. 59 (1826); Aff. 2 S. 728.

93. Opinion by the Lord Chancellor, that conviction of a crime, inferring infamy and so disqualifying as a witness, is no objection to being called on to depone on reference to oath, but in other special circumstances the reference refused. — *Ritchie v. Mackay*, 3 W. & S. 484; 4 Bligh, N.S. 535 (1829); Aff. 4 S. 534.

94. Reference to oath will not be allowed in respect of irrelevant facts. — *Stevenson v. Rowand*, 4 W. & S. 177; 2 Dow & Cl. 104 (1830); Aff. 6 S. 272.

95. Reference to oath, in regard to a claim cut down by prescription, is not superseded by the admission of the character in which the debt is alleged to have been incurred, and the non-assertion that it has been paid. — *Macdougall v. Campbell*, 7 W. & S. 19 (1833); Aff. 8 S. 959.

See APPEAL, 122—BILL, 9, 13—COUNSEL, 3—EVIDENCE, 5, 8, 9.

4. Jury Trial.

(a.) Practice.

96. Before trial by jury could be of advantage in Scotland they must

first alter their mode of pleading in that country. (Per Lord Eldon.) — *Wilson v. Alexander*, 5 P. 188 (1807).

97. Observed by Lord Eldon that the introduction of trial by jury was much to be desired. — *Smith v. Macneil*, 2 Dow, 544 (1814).

98. On a view being ordered, the viewers are to be selected from the jurors returned for the county in which the cause of action arises. When a motion for a new trial has been made and refused, the interlocutor cannot be appealed from, and the verdict being thus established, there can be no appeal upon any other ground on which it could be challenged. — *M'Kenzie v. Ross*, 1 S. Ap. 99 and 109 (1822); Aff. 2 Muir, 20.

99. After a remit to the Jury Court, under the 59 Geo. III. c. 35, and the cause being retransmitted by consent to the Court of Session for judgment on a point of law before trial, it was competent to order a proof by commission. — *Mags. of Lanark v. Hutchison*, 2 S. Ap. 386 (1824); Aff. 2 S. 318.

100. After a case has been remitted for trial by jury, it is incompetent to have it of consent remitted back to have the evidence taken on commission. — *Craig v. Duffus*, 6 S. Bell, 308 (1848); Aff. See observations on this case in *Dudgeon v. Thomson*, 1 M'Q. 714.

101. When an action is not merely for damages, but in addition *ad factum praestandum*, it is not imperative to send it to a jury. — *Craufurd v. Dixon*, 2 W. & S. 354 (1826); Aff. 2 S. 667.

102. A question as to intromission as heir with the ancestor's estate is proper to be tried by a jury. No appeal lies against an order of the Lord Ordinary remitting a case for such trial. — *Montgomery v. Boswell*, M'L. & R. 136 (1839); Rev. 16 S. 1086.

103. It is unnecessary to send a case to a jury when, on the documents referred to by the pursuer being examined, it is apparent he has no case. If a party sets out part of a document, he is bound to set out the whole, in so far as it bears on the case. — *Bell v. Mylne*, 2 Robin. 286 (1841); Aff. 16 D. 1136.

104. A pursuer of a declarator of marriage, coupled with alternative conclusions for damages for seduction, is not entitled to have the latter branch sent to a jury; circumstances held not to amount to seduction. — *Stewart v. Menzies*, 2 Robin. 547; 8 Cl. & Fin. 309; Aff. 15 S. 1198.

105. The order directing a cause to be tried at a circuit town, but not at the time of the circuit, under 1 Will. IV. c. 69, § 11, need not be in writing. Observed that if writing had been necessary, the appearance of the parties would not have cured the want of jurisdiction arising from the want of writing. — *Cleland v. Paterson*, 4 S. Bell, 175 (1845); Aff. 5 D. 345.

106. Though parts of the statute 5 and 6 Will. IV. c. 83, respect-

ing patents apply to Scotland, the fifth section requiring notice of objections does not, such notice being provided by the system of pleading in Scotland. (Per Lord Campbell)—The practice of the law of Scotland in confining the parties in a trial of the general issue to the statements made in the record, is very salutary, and it is desirable that similar rules prevailed in England. — *Househill Co. v. Neilson*, 2 S. Bell, 1; 9 Cl. & Fin. 788 (1843); Aff. 5 D. 86.

107. When an issue has been sent for trial, it is improper for the presiding judge to suggest that it contains rather matter of law than of fact, and therefore that a special case should be substituted for the verdict of a jury. — *Oswald v. M'Whir*, 1 S. & M'L. 393 (1835); Rev. 11 S. 552.

108. An objection that in a case belonging to the Second Division the First Division made an order appointing one of the parties to be the pursuer in a jury trial, not having been made at the time, cannot be made after the verdict. — *Lumsden v. Duff*, 7 S. Bell, 288 (1850); Aff. 9 D. 1402. See 105, and Acquiescence, 5.

(b.) *Issues.*

109. After an issue is adjusted, it cannot be explained by reference to the record, and to the other circumstances in the case. Therefore, when the issue was to try whether a certain dam-dyke was to the injury and damage of the pursuer as proprietor of salmon-fishings, it is wrong to direct the jury to consider what would be the effect of other dam-dykes on the fishing, supposing the one in question were removed. — *Leys v. Lord Forbes*, 5 W. & S. 384 (1831); Aff. 9 S. 933.

110. A question being raised whether certain stake-nets fell within the exception of a statute, as being "within the water of Solway," held that such question ought to be put directly by the issue, and that an issue, whether or not they were "within the bounds of the river Nith," was irrelevant and useless. And the parties having by a statement of facts, which it was agreed should have the effect of a special verdict, stated that the nets were placed on sands within the Nith, above the point at which it joins the Solway Firth at low water; remit to direct a new issue to ascertain whether that point is within Solway water or not. — *Oswald v. M'Whir*, 1 S. & M'L. 393 (1835); Rev. 11 S. 552.

111. An issue to inquire whether the defender did certain acts, should not add the words, "or cause to be done," as that is implied in the former expressions. "To the loss, injury," is superfluous; "to the damage of the pursuer" being the proper phrase. (Per Lord Brougham.) — *Oswald v. M'Whir*, 1 S. & M'L. 393 (1835); 11 S. 552.

112. An issue whether an act be to the loss, injury, and damage of

the party suffering, is different from one inquiring whether it be to the damage only, the former involving the question of the liability in point of law, as well as the damage in point of fact. (Per Lord Cottenham.) — *Duncan v. Findlater*, M'L. & R. 925 ; 6 Cl. & Fin. 894 (1839).

113. An issue ought to contain only one question, capable of only two answers, not one capable of three or more answers. In a question as to knowledge of a will, the fact of the will being referred to by its date in the issue, does not render knowledge of the date a point material to be proved. — *Cleland v. Weir*, 6 S. Bell, 70 (1847); Rev. 9 D. 199.

114. It is improper to couple two distinct grounds of action in one issue, such as "fraudulent concealment or fraudulent misrepresentation." The jury, if such an issue is brought before them, ought to be directed to return a special verdict, applying to each question separately. No judgment can pass upon a verdict unless the record supports it. — *Irvine v. Kirkpatrick*, 7 S. Bell, 186 (1850); Rev. 10 D. 367.

(c.) *Verdict.*

115. The findings of a jury are conclusive, even though the Court may afterwards be of opinion that the case ought not to have been sent to a jury; but though they may negative actual fraud, the Court is still bound to consider whether, on the findings, there is not a case of legal fraud. — *Spier v. Dunlop*, 2 W. & S. 253 (1826); Rev. 4 S. 92.

116. Undistinguished damages being given in an action of which one of the grounds was found irrelevant under a bill of exception on appeal; remit to grant a new trial. — *Erving v. Cullen*, 6 W. & S. 566 (1833); Rev. 10 S. 497.

117. When a summons charges a joint and several liability, and the verdict of the jury finds the defenders "liable," there is no variance between the summons and the verdict, and the verdict will be interpreted by the summons. — *Campbell v. Campbell*, 1 Robin. 1 ; 7 Cl. & Fin. 166 (1840); Aff.

118. Where an issue is directed as to all or any of certain documents being obtained by fraud or intimidation, and the verdict is entered "for the pursuers," it is a misprision of the clerk in so entering it, for it ought to be entered as an affirmative of every question put in issue as to all the documents. It is to be presumed that the judge directed the jury that a general verdict must have that interpretation; and it is in the discretion of the Court, on the judge's notes, to amend the entry of the verdict accordingly. Observations on the inconvenience of alternative issues. — *Marianski v. Cairns*, 1 M'Q. 212 ; 1 Stu. 1108 (1851); Aff. 12 D. 1286.

119. After a trial, on a motion to have the verdict entered up in pursuance of leave reserved, it is incompetent to look at the pleas in

law to explain the issue. — *Brydon v. Stewart*, 2 M'Q. 30 (1855); *Rev.*

120. Under a double issue, 1st, Whether A. is heir-at-law; and, 2d, Whether A. and B. are next of kin, the jury brought in a verdict, "We find the case of the pursuer not proven." Held that the issues were right (diss. Lord Brougham), and the verdict not defective in form, but bad, because of uncertainty as to which of the issues it applied to, and only necessarily meaning that both could not be affirmed. Held that, in such a case, an appeal lay from the interlocutor applying the verdict, without application for a new trial in the Court below. — *Morgan v. Morris*, 2 M'Q. 342 (1855); *Rev.* 16 D. 82.

121. After evidence given, a jury ought not to be discharged without finding a verdict for one of the parties, or a special verdict of facts, and except with consent of parties they cannot find for one or other, subject to the opinion of the Court, on a point of law. But the consent of parties to the case being left to the Court on points of law, after evidence is taken, but without a verdict, does not make the Court an arbiter, and consequently its judgment remains subject to appeal. — *Dixon v. Bovill*, 3 M'Q. 1 (1857); *Aff.* 16 D. 619. *Mackenzie v. Dunlop*, 3 M'Q. 22 (1857); *Aff.* 16 D. 129.

122. On a remit to the Court below, with declaration that the verdict of the jury set forth in an appeal against a judgment applying it, was uncertain, the Court has no power to amend the verdict, but ought to order a new trial. It is in the power of the House to order a new trial. On such order, costs reserved. — *Morgan v. Morris*, 3 M'Q. 323 (1858); *Rev.* 18 D. 797. *See* 138.

123. On a remit by the House to the Court below, that the Judge who presided at a trial may amend the entry of the verdict according to the substance of the actual findings, and of his notes, it is competent to the Judge to make such amendment from his recollection of the directions he gave the jury, although he has no notes, and on such amendment being reported to the House, it proceeds to dispose of the original appeal. — *Marianski v. Cairns*, 1 M'Q. 766 (1854); *Aff.* 15 D. 268.

(d.) *Bill of Exceptions and New Trial.*

124. A bill of exceptions ought to state the whole of the Judge's observations in the ruling excepted to, but it does not lie for a statement as to the effect of the evidence, which can only form ground for a motion for a new trial. There should be only one bill of exceptions on a trial, which ought to include all the points excepted to; but — Query, Whether it is competent to bring two appeals on separate bills of exceptions tendered at the same trial? — *Duff v. Earl of Fife*, 2 W. & S. 166 (1826); *Aff.* 4 S. 335.

125. Although in a jury trial the admission of improper evidence necessitates a new trial, it does not do so when the evidence is considered by the Court, and their decision does not proceed on the objectionable portion. (Per Lord Wynford.) — *Galbraith v. Galbraith*, 5 W. & S. 84 (1831). See Appeal, 112.

126. A bill of exceptions should only state the ruling objected to, and should not state what the ruling should have been. — *Leys v. Lord Forbes*, 5 W. & S. 384 (1831); *Aff.* 9 S. 933.

127. The Court, in considering a bill of exceptions on the ground of misdirection in point of law, are bound to decide whether the law laid down was right or not, and cannot go into the circumstances of the case and the evidence. — *Gordon v. Graham*, 2 Robin. 251; 8 Cl. & Fin. 107 (1841); *Rev. F.C.* 2d Feb. 1841.

128. If by a direction of the Judge the jury might have been led into error, the exceptions must be allowed and a new trial granted, although the Court is of opinion that on the evidence the verdict was right. — *Househill Co. v. Neilson*, 2 S. Bell, 1; 9 Cl. & Fin. 788 (1843); *Rev.* 5 D. 86, 1180.

129. The jury is supposed to pay equal attention to all the Judge says, and therefore his charge is to be read together, and not by isolated passages. It is not sufficient to support a bill of exceptions that the charge did not lay down the law in the clearest possible manner, if the law is not mis-stated. One exception being withdrawn at the bar of the House, the fact stated in the judgment. — *Ross v. Duke of Sutherland*, 3 S. Bell, 315 (1844); 6 D. 425.

130. If evidence is only objected to on the ground of surprise, and that is not a valid objection, no other can be considered than that set forth in the bill of exceptions. — *Bain v. Whitehaven Ry. Co.*, 7 S. Bell, 79; 3 H. L. Ca. 1 (1850); *Aff.* 12 D. 829.

131. It is irregular for a Judge to insist, after the verdict, on introducing new matter of explanation into the bill of exceptions actually tendered to him and signed by him previously; but on such amended bill of exceptions being certified by him, the Court is precluded from listening to any objection to it. — *Earl of Glasgow v. Hurlet Alum Co.* 7 S. Bell, 100; 3 H. L. Ca. 25 (1850); *Aff.* 12 D. 704.

132. The ruling of the judge must be stated accurately where excepted to. The Court cannot look at the documents to which the ruling applies unless authenticated by the Judge's signature. Although evidence is rejected, and exception taken, it is the duty of the party who tendered it to give all the other evidence in his power, and in considering the effect of the evidence rejected he will be assumed to have done so. — *Hutchinson v. Ferrier*, 1 M'Q. 196; 1 Stu. 677 (1852); *Aff.* 13 D. 837.

133. A recommendation by the Judge is equivalent to a direction. The Judge may append to a bill of exceptions to his charge a note of what he really said. — *Sutton v. Ainslie*, 1 *M'Q.* 299 ; 1 *Stu.* 702 (1852) ; *Aff.* 14 *D.* 184.

134. In a question as to the existence of a partnership between pawnbrokers, the defence being that it was illegal, as the name of the alleged partner did not appear over the door and in the licenses and pawn tickets, it is for the jury to find whether or not this was part of the original contract, because if not it would not vitiate the partnership, and the Judge ought not to charge the jury that on the facts proved there was no lawful partnership. — *Fraser v. Hill*, 1 *M'Q.* 392 ; 2 *Stu. H. L.* 65 (1853) ; *Rev.* 14 *D.* 335.

135. A bill of exceptions allowed where the Judge told the jury that the pursuer could not recover when the question was one of fact on which there was evidence for the jury. Costs in the Court below may be given when the House reversing disallows exceptions, but not when it allows exceptions, because in that case the error has been in the Judge. — *Paterson v. Wallace*, 1 *M'Q.* 748 (1854) ; *Rev.* 16 *D.* 243.

136. A bill of exceptions is always construed strictly, and if the words excepted to as stated therein are sound in law, the Court cannot consider the intention to have been to state them otherwise. Opinion that the form of special case should be introduced in substitution for bill of exceptions. — *Kyle v. Jeffreys*, 3 *M'Q.* 611 (1859) ; *Aff.* 18 *D.* 906.

137. The Court, in ordering a new trial by jury, may order a new issue. — *Inglis v. Great Northern Ry. Co.* ; 1 *M'Q.* 112 ; 1 *Stu.* 749 (1852) ; *Aff.* 13 *D.* 1315.

138. New trial ordered where the ruling of the Judge might have misled the jury. When there is no appeal against the issue a new trial can only be ordered on the same issue. — *Cleland v. Weir*, 6 *S. Bell*, 70 (1847) ; *Rev.* 9 *D.* 199.

See APPEAL (JURY CASES), p. 28, and No. 112—EVIDENCE, 20.

IX. DECREE.

139. After decree reserving certain points it is incompetent to object either that they did not fall within the conclusions of the action, or that there was *lis finita* regarding them. — *Cockburn v. Hamilton, Robert.* 32 (1712) ; *Rev.*

140. A decree founded on another decree, which is not produced to the Court, is null. — *Maxwell v. Sharp, Robert.* 380 (1721) ; *Aff.*

141. After an interlocutor deciding the main question, the Court of Session allowed the losing party ten days to bring his accounts for counter-claims ; he appealed, before that time expired, against the principal interlocutor, and it was affirmed. It is then incompetent

for him to bring in his accounts under the second interlocutor, but reserving his right to bring an action for any articles that might be due him. — *Arratt v. Wilson, Robert*, 409 (1722); *Aff.*

142. In a declarator praying to have certain rights found, it is incompetent for the Court to issue findings for other questions than those raised in the summons. — *Munroe v. Forbes*, 3 P. 23 (1785); *Rev.*

143. The Lord Ordinary may, after the reclaiming days, explain the meaning of his interlocutor. — *Earl of Aboyne v. Innes*, 6 P. 444 (1819); *Aff. F. C.* 22d June 1813.

144. An interlocutor having directed general objections to be lodged, reserving particular objections, it is not competent to decide finally on objections without calling for particular objections. — *Lord Montgomerie v. Wauchope*, 4 Dow, 109 (1816); *Rem.*

145. Though a foreign debt was incurred in dollars, the Court ought to express it in sterling money in its decree, but held that they were right in giving interest at the Scottish, not the American rate, from the date of action. — *Hyslops v. Gordon*, 2 S. Ap. 451 (1824); *Alt.*

146. Decree having inadvertently been given for sterling money, when the sum concluded for was expressed in colonial currency, the cause remitted to ascertain the true corresponding amount in sterling money, and to alter the decree accordingly. — *M'Braire v. Hamilton*, 2 W. & S. 66 (1826); *Rem.* 4 S. 24.

147. A jury being of consent dismissed on the terms that the defender, in settling with the pursuers for L.3000, which he acknowledged himself to have intromitted with, should be allowed credit for L.1000 as his outlay and account, the Court is warranted in decerning *de plano* for payment by the defender of L.2000. — *Baillie v. Baillie*, 6 W. & S. 498 (1833); *Aff.*

148. When the Lord Ordinary has stated the principle on which an accounting is to be carried on, and the Inner House has adhered to the interlocutor, and remitted to the Lord Ordinary to proceed, it is incompetent for him to adopt a different principle, even although the Court adhere to it. — *Baillie (Clyne's Trs.) v. Stewart*, 2 S. & M'L. 45 (1835); *Rev.* 11 S. 727.

149. It is competent for the Court to decide first the general principle, reserving its application. — *Alexander v. Macalister*, M'L. & R. 353 (1839); *Aff.* 15 S. 1061.

150. Unless there is an express finding of the Court, the general decree of absolvitor "sustains the defences,"—does not affirm the pleas of the defender. — *Kerr v. Dickson*, 1 S. Bell, 499 (1842).

151. Findings in law need not include incidental findings as to the burden of proof or rejection of evidence. — *Anderson v. Gill*, 3 M'Q. 180 (1858).

152. When a summons of declarator claimed certain rights, part of which the defenders did not dispute, and on the remainder of which they were assolizied, the judgment was of absolvitor from the conclusions generally; the House holding that the record would sufficiently shew what had really been in dispute. — *Edinburgh and Glasgow Ry. Co. v. Mags. of Linlithgow*, 3 M'Q. 691 (1859).

153. It is not proper that the Lord Ordinary, after a proof in the Sheriff-Court, should merely adhere *simpliciter* to the interlocutor of the Sheriff, and the Court will properly remit to him to find the facts specifically. — *Wishart v. Wylie*, 2 St. H. L. 68 (1853); Aff. 13 D. 1100.

154. When the Lord Ordinary has specifically found the facts established by proof in an advocacy, and the law thereupon, it is sufficient if the Inner House adhere *simpliciter* to his interlocutor. — *Weems v. Mathison*, 4 M'Q. 215 (1861).

See APPEAL—REMIT.

X. PROCEDURE ON REMIT.

155. When the House has remitted part of a cause for review, any interlocutor by the Court below on what is not included in the remit, is null and void. — *Blane v. Earl of Cassilis*, 5 P. 307 (1810).

156. The Court is not entitled in any case to suspend the application of a judgment of the House of Lords. — *Stewart v. Agnew*, 1 S. Ap. 413 (1823).

157. The Court of Session cannot refuse to apply a judgment of the House of Lords on the ground that it was rendered imperative by a reduction obtained in the Court of Session and not appealed from. — *Davidson v. Lockwood*, 2 S. Ap. 357 (1824); Rev.

158. Interlocutors pronounced by the Court of Session on a remit by the House, if on a branch of the case not intended to be remitted, will be declared void. — *Cathcart v. Earl of Cassilis*, 1 W. & S. 239 (1825).

159. If a petition to the Court to apply the judgment of the House of Lords prays for more than the judgment warrants, the surplusage should be dismissed with costs. — *Whitehead v. Galbraith*, 4 M'Q. 283 (1861).

ADJUDICATION.

I. GROUNDS OF, p.	21	III. RANKING OF, p.	23
II. POSSESSION ON,	22		

I. GROUNDS OF.

1. The principal penalty in a bond, and also the termly penalties for non-payment of interest, cannot be included in an adjudication,

and where they are, the adjudication is reduced to the effect of only standing as a security for the principal sum and interest to the date of the adjudication ; or a judicial sale of the estate, proceeding on such adjudication, is reducible even after the lapse of sixty years. — *Nasmyth v. Samson*, 3 P. 9 (1785) ; Aff. M. 120.

2. Interest accumulated in an adjudication becomes heritable. — *Sinclair v. Young*, 3 P. 64 (1787) ; Aff. M. 5545.

3. An acknowledgment of debt “for 2500 or 2300 merks, I know not whether,” is a good ground of adjudication for 2500 merks. The accumulation of interest, with capital, in an adjudication, is of the nature of a penalty, and therefore held inadmissible under the Vesting Act, 20 Geo. II. c. 41, which disallowed any claim for penalties. — *Lord Advocate v. Mackenzie*, 6 P. 709 (1756) ; Rev. M. 220.

II. POSSESSION ON.

4. An adjudication being in part reduced, and, as to the remainder, found extinguished by intromissions, the adjudger is bound to account, as in *mala fide* possession, for his intromissions from the date of citation in the reduction and arrestment of the rents. — *Walker v. Forrester*, Robert. 405 (1722) ; Rev. M. 302.

5. In an action of maills and duties by an adjudger, the owner of the estate cannot be allowed to object to the adjudication as extinguished by payment, or informal, without bringing an action of declarator, or reduction, and the estate is meanwhile sequestrated. Question as to jurisdiction of the Court of Session, and the liabilities of superiors taking an estate under the Forfeiture Act. — *Earl of Sutherland v. Dunbar*, Robert. 531 ; 19 Ap. (1725) ; Aff.

6. Charter and sasine on an adjudication does not prevent it being worked off by prescription when not followed by possession or acknowledgment within the years of prescription ; and possession of part of the lands under the adjudication and acknowledgment interrupts prescription only as to that part. Interest on the original debt only allowed from the first citation in the action for maills and duties. — *Clarke v. Earl of Home*, Cr. & St. 533 (1753) ; Alt. M. 10662.

7. Possession for forty years after declarator of the expiry of the legal, but without charter and sasine, does not give a prescriptive title, and the adjudger is still liable to account to a posterior adjudger. — *Gillespie v. Bogle*, 3 P. 305 (1793) ; Aff.

8. A decree of declarator of expiry of the legal cannot be opened up on a plea of *pluris petitio* in the adjudication, as against an onerous purchaser of the estate, but it may be opened up to make the adjudger's heirs liable to account. — *Hutchison v. Young*, 6 P. 783 (1771) ; Aff.

9. Adjudication, whether followed or not by infestment, but followed

by crown charter and sasine, and possession for forty years after expiry of the legal, though no declarator of expiry was obtained, is a good title. — *Robertson v. Duke of Atholl*, 3 Dow, 108 (1815).

10. Prescriptive possession on charter of adjudication and sasine excludes objection to the warrant of the adjudication. — *Lawrie v. Livingstone*, 6 P. 194 (1816); Aff.

See FRAUD, 4.

III. RANKING OF.

11. Subsequent adjudications within year and day of the first not made void by the circumstance that they have not been intimated under the statute 23 Geo. III. c. 18, § 5. — *Du Roveray v. Mackenzie*, 3 P. 409 (1795); Aff.

See BANKRUPTCY, 53—CONVEYANCING, 2—CROWN, 4.

ADMIRALTY.

1. The Admiralty Court of England, not that of Scotland, has jurisdiction over a prize brought into a port in Scotland by private captors without commission. — *Jackson v. Monro*, 2 Br. P. C. 411 (1779); *Rev. M.* 7522.

2. An action to have a ship condemned as prize is not competent in the Admiralty Court of Scotland, nor in the Court of Session. — *Hendricks v. Cunningham*, 2 P. 609; 5 Br. P. C. 328 (1783); *Rev. M.* 11959.

3. A crown charter granting "wrack, wair, and waith" does not confer on the grantee the power of a Court of Admiralty, and neither as such, nor as justice of the peace, is he entitled to take a vessel in distress out of the hands of sailors already in possession of it. — *M'Dowall v. M'Dowall*, 1 W. & S. 22 (1825); Aff.

4. An arrestment *juris. fund. causa* obtained against a foreigner in the Admiralty Court, in a case not maritime, did not establish jurisdiction, and such jurisdiction could not be supported by the fact that the foreigner has sisted himself as pursuer in actions in the Court of Session. — *Stirling v. Houston*, 1 W. & S. 199 (1825); Aff. 2 S. 672.

See BELLIGERENT.

ADVOCATE.—See COUNSEL.

AGENT.—See LAW-AGENT—PRINCIPAL AND AGENT.

ALIEN.

1. A natural-born subject of England had issue born before the 7th of Anne, out of the legiance of the queen, and such issue had issue

born out of the allegiance of the king ; this second issue is an alien, not capable of taking lands for his own benefit in the United Kingdom. Question submitted to English judges. — *Leslie v. Grant*, 2 P. 68 (1763) ; *Aff.*

2. The Act 1695, establishing the Bank of Scotland, declares that all the subscribers to its stock shall become naturalised Scotsmen, but that provision applied only to the original subscribers and not to purchasers from them. Query, Whether a declarator of naturalisation in which the Officers of State are made defenders, is a proper form of action for trying such a question, and whether the Court of Session, being a local jurisdiction, would, after the Union, have jurisdiction to declare the public law of the whole kingdom. (Per Lord Redesdale.) — *Macao v. Off. of State*, 1 S. Ap. 138 (1822) ; *Aff. F. C.* 14th Nov. 1820.

See FORFEITURE, 16—LEGITIMATION, 1, 7.

ALIMENT OF HEIR.

1. A father with an estate of from L.500 to L.600 per annum, and personal estate of about L.5000 capital, having granted his eldest son an aliment of 2000 merks (L.111), it ought not to be raised by the Court. — *Moncreiff v. Moncreiff*, Cr. & St. 162 (1735) ; *Rev.*

2. On the marriage of a ward of Chancery, a settlement of the personal property was made by the Court on her for life, and after her death to the children, vesting in them at twenty-one, and the real estate to her for life, remainder to her eldest son in tail. After her widowhood she removed to Scotland and married there. Held that her eldest son by the first marriage had, after majority, a valuable vested interest in the whole property, on which he could raise money for his support, and on that ground, as well as that the settlement was an English deed, conclusive of the rights of the children, that he had no claim for aliment. — *Wooley v. Maidment*, 6 Dow, 257 (1818) ; *Rev. F. C.* 25th May 1815.

3. A son having the pay of ensign and L.100 a-year allowance from his father, who was worth L.10,000 a-year, held not entitled to further aliment. *Obs.* That the Stat. 1491, c. 25, does not compel a liferenter to support the fiar who is no relation to him. — *Maule v. Maule*, 1 W. & S. 266 (1825) ; *Rev.* 2 S. 464.

4. An entailer having by relative trust-deed given the estate to trustees for thirty years after his death, for the purpose of excluding the next heir from possession, the latter has no claim for aliment out of the estate, having a small income from other sources. — *Lord Glamis v. Paul*, 1 W. & S. 183 (1825) ; *Aff.* 2 S. 234.

5. A peer excluded by trust-deed from the rents of the family estates, but having received L.12,000 from his father, has no claim against the trustees for aliment. — *Earl of Strathmore v. Paul*, 1 W. & S. 402 (1825); *Aff.* 2 S. 84.

ALIMENT OF WIFE.—*See* HUSBAND AND WIFE. OF MOTHER, *see* DAMAGES, 11.

ALIMENTARY PROVISION.—*See* ASSIGNATION, 1—PROVISION.

APPEAL.

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I. APPEAL CASES.

1. It is the duty of counsel in England, on receiving from Scotland appeal cases containing irrelevant matter, to redraw them. (Per Lord Loughborough.) — *Sime v. Viscount Arbuthnott*, 3 P. 610 (1797).

2. In the case of appeals brought obviously for delay only, the House will proceed against the counsel signing them, in the same way as the Courts do against counsel giving countenance to frivolous or vexatious suits. — *Gilchrist v. Macadam*, 4 P. 26 (1798).

3. It is a breach of privilege to append the name of a counsel to an appeal case before he is retained or authorises the signature. (Per Lord Brougham)—It is contrary to professional propriety for one counsel to recommend another to be employed with him, or in a case in which he had been consulted. — *Grahame v. Grahame*, 5 W. & S. 759 (1831).

4. Observations by Lord Brougham on the duty incumbent on counsel of not signing an appeal case unless they consider it proper to be appealed, whether there was division in the Court or not. — *Rintoul v. Boyter*, 6 W. & S. 404, and *Gordon v. Dunn*, 7 W. & S. 80 (1833).

5. Observed by Lord Brougham, that it forms no ground for appeal that the Judges in the Court below did not give reasons for their judgment; and remarks on the practice of Lords Thurlow and Lough-

borough in scarcely giving reasons for their division. — *Cox v. Stead*, 7 W. & S. 516 (1834). See Court of Session, 16.

6. Counsel ought to exercise great caution in signing appeal certificates of fitness for appeal. — *Colville v. Colville*, 4 S. Bell, 248 (1845).

7. Where the appellant is too poor to procure a copy of the record, the House will allow him to lodge the record itself instead. — *Malcolm v. Young*, 3 W. & S. 404 (1829).

II. FROM WHAT COURTS COMPETENT.

8. Appeal lay from order of Court of Session refusing a suspension of a judgment of the magistrates, and also from such judgment, enforcing by imprisonment an act of the Presbytery forbidding an Episcopal clergyman to preach within their bounds. — *Greenshields v. Mags. of Edinburgh*, Robert. 12; Colles, 427 (1711); Rev. 4 Br. Sup. 774.

9. An appeal admitted against a sentence of the Court of Justiciary in a prosecution at the instance of a private prosecutor, with concurrence of the Lord Advocate, under the Acts 1695, c. 22, and 1711, c. 7 (intrusion into a church), and the fine imposed ordered to be repaid. — *Innes v. Ministers of Elgin*, Robert. 69 (1713); Rev. Macl. Crim. 582.

10. No appeal lies from the order of the Court of Exchequer acting ministerially as a Board of Treasury, under the special direction of an Act of Parliament. — *Haldane v. Earl Marischal*, 2 P. 443 (1778).

11. No appeal in a criminal case lies from the decision of the Court of Justiciary, either in law or fact. — *Bywater v. The Crown*, 2 P. 563 (1781).

See FORFEITURE.

III. WHAT INTERLOCUTORS APPEALABLE.

(a.) *Ordinary Actions.*

12. A pursuer having obtained a diligence to take the defender's oath as a haver, and afterwards judicially passed from the same and consented to the term being circumduced, he cannot appeal from prior interlocutors respecting the defender's deponing upon or producing any writs under the diligence. — *Scott v. Lord Napier*, Cr. & St. 441 (1749).

13. It is incompetent to appeal from an interlocutor passing a bill of suspension, to the effect of trying the legal question. — *Smith v. Scott*, 4 P. 17 (1798).

14. Appeal is incompetent against the decrees of the Court of Session in carrying out a sale under a private Act of Parliament, except by way of appeal from the decree in an action of reduction of these decrees. — *Agnew v. Dunlop (Sheuchan)*, 6 P. 63 (1814).

15. An interlocutor of the Lord Ordinary not reclaimed against, cannot be reviewed by appeal to the House of Lords. — *Jeffrey v. Brown*, 2 S. Ap. 349 (1824) ; Aff. 1 S. 102. See 21, 24.

16. An interlocutor virtually exhausting the cause, but reserving a small item for further hearing, may be appealed from without leave after an interlocutor is pronounced on the point reserved, and which last is acquiesced in. — *Downe v. Pitcairn*, 3 W. & S. 472 ; 4 Bligh, N. S. 550 (1829).

17. The rents of a landed estate being sequestrated pending an action the decree in which is appealed, the appellant is not justified in also appealing on the question of the sequestration, and exemplary costs given against him. — *Cathcart v. Cathcart*, 5 W. & S. 315 (1831).

18. An interlocutor sisting a ranking and sale till the discussion on a reduction of an entail of the estate, is not a judgment which can be competently appealed. — *Ferrier v. Moubray*, 7 W. & S. 147 (1834) ; 10 S. 616.

19. A claim to a servitude *stillicidii* was made in course of procedure in a petition of lining before the Dean of Guild Court ; the judgment was advocated after a proof, and a relative action of declarator of servitude brought and conjoined with the advocacy, in which of consent the proof was held as repeated, and an interlocutor was pronounced with special findings of fact in the advocacy, and assolzieing the defender in the declarator ; held that the latter could not be appealed as regards the questions of fact found in the advocacy. — *Jack v. Lyall*, 1 S. & M'L. 77 (1835) ; Aff. 11 S. 711.

20. Both parties having reclaimed against an Outer House interlocutor, and the counsel for one having, on the first reclaiming note of the opposite party being refused, abstained from arguing in support of his own, held that appeal against the refusal of the last is not incompetent, but the appellant is prevented from insisting in it. — *Tailors of Aberdeen v. Coutts*, 2 S. & M'L. 645 (1837).

21. Question whether on a principle of accounting being fixed by interlocutor of the Lord Ordinary not reclaimed against, such interlocutor can be appealed from, along with subsequent interlocutors carrying out the principle of accounting so fixed. — *Clyne's Trs. v. Dunnet*, M'L. & R. 28 (1839).

22. It is improper to appeal against interlocutors giving a party the benefit of the poor roll. No appeal lies against an interlocutor granting warrant for interim execution of a decree for payment of expenses. The copy of petition of appeal presented to the Court in an application for interim execution need not be printed. — *Clyne's Trs. v. Clyne*, M'Q. & R. 72 ; 6 Cl. & Fin. 539 (1839).

23. An interlocutor by the Inner House passing a bill of suspension

on report of the Lord Ordinary is a final judgment to the extent of warranting appeal without leave. — *Fleming v. Dunlop*, M'L. & R. 547; 7 Cl. & Fin. 43 (1839).

24. Question whether in an appeal from several interlocutors of the Inner House it is competent to appeal as to an interlocutor of the Lord Ordinary, involved in their findings, but which had not been specifically reclaimed against. — *Union Canal Co. v. Carmichael*, 1 S. Bell, 316 (1842).

25. When on a defence of irrelevancy, personal bar, or want of jurisdiction, the Court remits to an accountant to take evidence of the merits, that is virtually a decision on the merits, and therefore appealable without leave. — *North British Bank v. Collins*, 1 M'Q. 369; 2 Stu. H. L. 26 (1852); 13 D. 349. See *Action*, 25.

26. A remit to a surveyor to prepare a plan is not an order for further proof under the 59 Geo. III. c. 35, § 14. Question whether, if it were, review of such evidence would be excluded by the 6 Geo. IV. c. 120, § 40. — *Wishart v. Wylie*, 2 St. H. L. 68 (1853); Aff. 13 D. 1100.

27. Interdict against sale of poinded goods being granted on caution for such damages as the Court might assess, if the interdict was ultimately found to have been wrongfully granted, no appeal lies against the judgment of the Court assessing such damages. — *Buchanan v. Douglas*, 2 M'Q. 48 (1855).

See *ACTION*, 49, 51, 63—*BANKRUPTCY*, 43—*COURT OF SESSION*, 1.

(b.) *Jury Cases.*

28. An order of the Jury Court directing issues to be framed under the 55 Geo. III. c. 42, and 59 Geo. III. c. 35, could not be appealed from. — *Rae v. Gibson Craig*, 1 S. Ap. 459 (1823); Aff.

29. The Court of Session had no power to review by suspension an interlocutor of the Jury Court, and where the Court of Session has no jurisdiction there is no room for appeal to the House. — *Megget v. Douglas*, 5 W. & S. 622 (1831); Aff. 8 S. 779.

30. Appeal is incompetent against an interlocutor refusing to remit a case falling under one of the clauses appropriated exclusively to trial by jury, to the ordinary roll of the Court of Session in order to trial otherwise, and observed that such interlocutor was right in principle. — *Bald v. Kerr*, 3 S. & M'L. 1 (1837); Aff. 15 D. 784.

31. On appeal from the final judgment, after a trial by jury, it is incompetent to appeal against the interlocutor ordering the case to be so tried. — *Balfour v. Lyle*, 2 S. & M'L. 12, note (1835); 10 S. 853. See *Action*, 102.

32. Leave of the Court is not required in appealing from an interlocutor sending to trial by jury a case not necessarily so tried,

or sent by the Lord Ordinary in the first instance. — *Marquis of Breadalbane v. M'Gregor*, 7 S. Bell, 43 (1848).

33. An appeal not being excluded under the 13 and 14 Vict. c. 36, § 38, as regards an interlocutor approving of issues, it is competent, if the Court is divided. The House will, if this fact is uncertain, remit to the Court to state it. — *Johnston v. Johnston*, 3 M'Q. 619 (1859); 19 D. 706; *Davidson v. Tulloch*, 3 M'Q. 783 (1860); 20 D. 1319. *See* 40, 44.

34. An appeal does not lie, except with leave of the Court, against an interlocutor directing an issue, although if an issue were refused, the whole merits would be disposed of. — *Scots Mines Co. v. Leadhills Mining Co.*, 3 M'Q. 743 (1859); 18 D. 594. *See* 44.

35. An interlocutor ordering a new trial in respect of the admission of improper evidence cannot be appealed from. Observations by Lord Eldon on the looseness of pleading a contract sued upon. — *Clark v. Callender*, 6 P. 422 (1819).

36. A question as to evidence reserved at a jury trial may be made the subject of appeal. — *Matheson v. Ross*, 6 S. Bell, 374 (1849).

37. After a verdict of a jury finding certain facts, and leaving to the Court to decide whether in law they amounted to "wrongful," as put in issue, has become final, it is incompetent to complain of it in an appeal from the judgment of the Court on the point of law. — *Cleland v. Weir*, 6 S. Bell, 402 (1849); Aff. 10 D. 199, 924.

38. A judgment applying a verdict, after a motion for a new trial has been refused, cannot be appealed on the ground that the jury went beyond the issue. — *Lumsden v. Duff*, 7 S. Bell, 288 (1850).

39. After a verdict of a jury, finding a party resting owing a sum, and a consequent interlocutor ordering it to be paid, it is not incompetent to appeal against such interlocutor, the appeal in such case not having been expressly taken away. — *Campbell v. Campbell*, M'L. & R. 387 (1839); 12 S. 923.

40. An appeal against an interlocutor applying a verdict will not entitle the parties to appeal against a prior interlocutor refusing a bill of exceptions, if the fourteen days limited for appeal against such interlocutor have expired, and consequently, on such appeal, the House cannot review the verdict or issue. Appeal does not lie against an interlocutor directing a matter to be tried by a jury, but it does lie against an interlocutor approving an issue. — *Melrose v. Hastie*, 1 M'Q. 698 (1854).

41. When the parties consent to the withdrawal of a case from a jury in order that it may be decided on the evidence by the Judge, no appeal lies from the Judge's decision, as he could not have so acted except by their consent. But observed that appeal would lie if they merely con-

sented to his adopting one of two courses, either of which was within his power. — *Dudgeon v. Thomson*, 1 M'Q. 714 (1854); 13 D. 1029.

42. On a case being of consent withdrawn during the trial from the jury, and referred to the judgment of the Court, the findings of the Court are not subject to appeal, though called findings in point of law, being such as the jury might have found. — *Mags. of Renfrew v. Hoby*, 2 M'Q. 478 (1856); 16 D. 348. See 112.

43. When under agreement that one case should follow the determination of a similar case, the Court has decreed for a sum in name of damages, an appeal from this interlocutor will bring under review all the previous interlocutors, including one refusing a bill of exceptions, and an interlocutor of the Lord Ordinary not reclaimed against. — *Bartonshill Coal Co. v. M'Guire*, 3 M'Q. 300 (1858).

44. Appeal lies against an interlocutor applying a verdict after an application for a new trial has been refused, but no bill of exceptions can be tendered against a refusal of a new trial. But after the trial the interlocutor approving the issues can be appealed from, and the House may declare that the issues should have raised a certain question, leaving it to the Court to remodel them accordingly. Although there is no exception to the Judge's summing up, it may be looked at by the House for the purpose of ascertaining the sense in which words in the issues were understood. — *Robertson v. Fleming*, 4 M'Q. 67 (1861); 21 D. 982. See 37, 38, 39.

See *infra*, 108—ACTION, 98, 120, 121, 122, and 123.

(c.) Practice of Court.

45. The House will not interfere or allow appeal upon questions relating to the regulation of practice by the Courts below. — *Soc. of W.S. v. Soc. of S.S.C.*, 4 P. 326 (1802).

46. The House will scarcely entertain an appeal on a question of practice of the Court only, every Court being the proper judge of its own practice. (Per Lord Wynford.) — *Ferrier v. Moubray*, 7 W. & S. 147 (1834); *Ferrier v. Howden*, 4 Cl. & Fin. 25 (1834).

47. The House will not on appeal alter a decision on a point of practice, unless it is indubitably wrong. — *Mags. of Annan v. Farish*, 2 S & M'L. 930 (1837); Aff. 14 S. 111.

48. The House will very reluctantly interfere with the decision of the Court on a question of practice, except in the single case where it is impossible to ascertain the grounds on which the decision can stand. — *Stewart v. Gloag*, M'L. & R. 750 (1839).

49. The House will not entertain an appeal on a question of mere discretionary practice, such as the conjoining of actions. Neither will it, under consent of the parties, permit an appeal to be heard which has

been presented after the lapse of the statutory time. In neither case will the leave of the Court render the appeal maintainable. — *North British Ry. Co. v. Wauchope*, 4 *M.Q.* 348 and 352 (1862); 23 *D.* 119. See 22.

(d.) *On Costs.*

50. Although the House will not entertain an appeal on the question of costs where they are in the discretion of the Court, it will where they are directed by statute to be given. — *Tod v. Tod*, 2 *W. & S.* 542; 1 *Bligh*, *N. S.* 637 (1827).

51. An appeal being brought against part of an interlocutor and a general finding as to costs, the interlocutor on the merits affirmed, but as to expenses reversed. — *Brodie v. Sinclair*, 5 *W. & S.* 567 (1831); *Rev.* 9 *S.* 36.

52. Though a judgment is appealed on the merits, yet if the appeal has not been brought solely, or colourably, in respect of costs, and the judgment below is in error in the matter of costs, it will be corrected in that respect. — *Robertson v. Harford*, 6 *W. & S.* 1 (1832); *Hunter v. Duff*, 6 *W. & S.* 206 (1832).

53. An appeal on the ground that, if the interlocutor complained of had been otherwise, the appellant would have been entitled to his expenses in the Court below, is truly an appeal on costs, and therefore inadmissible. — *M'Aulay v. Adam*, 1 *S. & M.L.* 665; 3 *Cl. & Fin.* 385 (1835).

54. Though on appeal the decision below is confirmed, the House may alter the judgment as regards costs, if the appeal has not been colourably brought for that purpose. — *Inglis v. Mansfield*, 1 *S. & M.L.* 203; 3 *Cl. & Fin.* 362 (1835).

55. The rule against an appeal colourably on the merits, but virtually only for costs, approved of. — *Clyne's Trs. v. Dunnet*, *M.L. & R.* 28 (1839).

56. Though an appeal on costs is not entertained, the question may virtually be appealed in another form in certain cases. — *Scott v. Curle*, 2 *Robin.* 317 (1841).

See 179.

IV. TIME FOR APPEALING.

57. Minority, or absence from the country, of the appellant does not operate to relieve him from the effect of the statutes and standing orders relative to the making appeals within a certain time. — *Frazer v. Lord Advocate*, 3 *P.* 425 (1795).

58. A cross appeal must be lodged within the statutory time for lodging appeals, as well as within the time prescribed by the standing

orders as to cross appeals, viz., within a fortnight after the answer in the principal appeal. — *Clerk v. Glasgow Ass. Co.*, 1 *M'Q.* 668 (1853). See 49.

V. PROCEDURE ON OBJECTION TO COMPETENCY.

59. An objection to the conjunction of an appeal in a principal cause with an appeal in an action of reduction of it, being as to a matter of form, ought to be made by petition, to be referred to the Appeal Committee. At the hearing the House assumes that all the proceedings are regular. An appeal withdrawn may be presented again within the five years. — *Dixon v. Graham*, 5 *Dow*, 266 (1817). See 66.

60. When the competency of an appeal is directed by the Appeal Committee to be argued at the bar of the House, it is not usual to permit a reply, but the House may permit it. — *Ferrier v. Howden*, 4 *Cl. & Fin.* 25 (1834).

61. The clerk of Session having, by a clerical error, made decree for expenses against the defender instead of the pursuer, and the Court having (after appeal entered to the House of Lords), upon petition, authorised the correction of the error, the House of Lords declined to allow the judgment making the correction to be added to the original appeal, and recommended the defender to settle the matter privately with the pursuer, which was done by the defender paying him L.70. — *Duguid v. Mitchells*, 1 *W. & S.* 203 (1825). See 150, 169 — Action, 26.

62. The House is not bound by a decision of the Appeal Committee. — *Clyne's Trs. v. Dunmet*, *M'L. & R.* 28 (1839).

63. Costs of appearance before Appeal Committee in opposing an appeal given against appellant. — *Gray v. Forbes*, *M'L. & R.* 530 (1839).

64. Costs of unsuccessfully resisting an appeal on the competency, when the appeal is afterwards dismissed on the merits, may be given if reserved at the discussion of the competency, but not otherwise. — *Campbell v. Campbell*, 1 *Robin.* 1; 7 *Cl. & Fin.* 166 (1840).

65. A petition to dismiss an appeal as incompetent, in respect the interlocutor was final as against one party, and had not been appealed in time, being dismissed, costs are given against the petitioner, though he is successful on the merits. — *Kerr v. Keith*, 1 *S. Bell*, 387 (1842).

66. An objection to the competency of an appeal ought to be made by petition, which would be referred to the Appeal Committee. — *Marquis of Breadalbane v. M'Gregor*, 7 *S. Bell*, 43 (1848). See 126, 140.

67. On a petition against an appeal as incompetent being ordered by the Appeal Committee to be argued, the House, on dismissing the appeal, will refer back to the committee the questions as to costs of the argument. — *Mags. of Renfrew v. Hoby*, 2 *M'Q.* 478 (1856).

68. When, on a petition being presented praying the dismissal of an appeal as incompetent, the Appeal Committee decides that it is competent, and the costs of the discussion are reserved till the hearing, and then the appeal is dismissed, the respondent will be entitled to his costs of the hearing on the merits, but will pay those of the discussion on competency. — *Johnston v. Johnston*, 3 M'Q. 619 (1859). See 127.

69. When, in consequence of a petition to dismiss, no order of service of an appeal is made by the House, proceedings are not stayed in the Court below. — *Davidson v. Tulloch*, 3 M'Q. 783 (1860); *Aff.* 20 D. 1319; *Robertson v. Fleming*, 4 M'Q. 167 (1861), 21 D. 1204.

70. The House, in hearing counsel on a petition against an appeal as incompetent, referred to it by the Appeal Committee, will require the party so petitioning to begin. Costs reserved till the hearing, and then not given. — *Geils v. Geils*, 1 M'Q. 36 (1851), and 276 (1852); 3 H. L. Ca. 280.

VI. PARTIES.

71. In a suit respecting an heritable office granted by the Crown, the Lord Advocate must be made a party in the appeal, as well as in the Court below. — *Mags. of Montrose v. Erskine*, Cr. & St. 222 (1738). See *Action*, 9—*Patronage*, 1.

72. Parties, whom the Court below refused to make parties, cannot be added in an appeal in which the interlocutor refusing them is not appealed from. — *Cunningham v. Chalmers*, Cr. & St. 267 (1740).

73. Remit to add proper parties where necessary "to do complete justice." — *Wauchope v. Hope*, 2 P. 338 (1774).

74. Appeal dismissed in respect all the parties were not made parties to the appeal. — *Short v. Short*, 2 P. 495 (1779); *Aff. M.* 5615.

75. Where an action is brought against several parties on a joint and several liability, an appeal cannot be heard unless all the parties are served with the order to answer it. — *Linwood v. Hathorn*, 1 S. Ap. 20; 3 Bligh, 193 (1821). See F. C. 14th May 1817.

76. On a party applying to be sisted in the House of Lords as respondent in room of a party deceased, and a personal objection being stated to him, the House remits the case to the Court of Session to hear and determine on the objection. — *Innes v. Mordaunt*, 1 S. Ap. 169 (1822).

77. When a party to a case has died before the appeal is heard, the House will not hear it till his representatives have been served. — *Murray v. Little*, 2 S. Ap. 202 (1824).

78. When it is necessary to add a party, the House of Lords remits the case to the Court below. — *Stirling v. Dun*, 3 W. & S. 462 (1829).

79. Question whether, in a declarator directed against a principal

only, a cautioner for the principal is entitled to appeal. — *Cabbell v. Brock*, *W. & S.* 75 (1828).

80. In an action against a corporation and its individual members, one of the members may appeal against the judgment if it involves him in a personal liability for damages or costs. — *Gray v. Forbes*, 3 *S. & M'L.* 381; 5 *Cl. & Fin.* 356 (1838).

81. A member of a town council may appeal from an interlocutor in which the council has acquiesced. — *Gray v. Forbes*, *M'L. & R.* 530 (1839).

82. An appeal by a trustee, with consent of a co-trustee who was solicitor to the trust in the Court below, is, as to costs, the same as if the appeal had been by both. — *Whitehead v. Galbraith*, 4 *M'Q.* 283 (1861); 23 *D.* 265.

See ACTION, 10.

VII. HEARING.

83. If a party desires to introduce new matter into an appeal lodged, he must withdraw his appeal and bring it before the Court below. — *Grahame v. Grahame*, 1 *W. & S.* 354 (1825). See 101, 102.

84. Where appellants do not appear to support the appeal, the House affirms the judgment without any consideration of the merits, or of the legality of the decree; but where the appellant appears, but not the respondent, the House will not presume the decree to be wrong until that is shown. — *Heriot's Hospital v. Cockburn*, 2 *W. & S.* 293 (1826).

85. A respondent not lodging his case in time, but having presented a petition to be allowed to lodge it, is not allowed to be heard, but the hearing may be adjourned on his paying costs of the day. — *Taylor v. Fairlie*, 2 *W. & S.* 101 (1826). See 141.

86. In a case of public importance, the respondents not having presented a case nor appearing by counsel, the House requested a counsel to support the judgment of the Court below, which was by their judgment reversed. So also in a divorce case. — *Off. of State v. Comrs. of Supply for Wigton*, 4 *W. & S.* 43 (1830); *Ritchie v. Ritchie*, 4 *M'Q.* 162 (1861).

87. Objections to documents and pleas as not being in issue will not be readily received by the House when the objection, though stated, has not been pressed in the Court below, and both parties have fully discussed the questions objected to. — *Halket v. Nisbet's Trs.*, *M'L. & R.* 53 (1839).

88. Parties having agreed upon a joint statement of the facts, on which the Court decides, it is incompetent to refer in the House to any other evidence. — *Reid v. Baxter*, 1 *Robin.* 70 (1840); 16 *S.* 273.

89. Query, Whether the Crown has a right to reply on the reply of

the appellant. — *Lord Douglas v. Off. of State*, 1 S. Bell, 537 (1842); 9 Cl. & Fin. 173.

90. When the Court, after a proof before the Sheriff, expressly adopts his findings in fact, the House cannot look at the evidence to discover other facts. *Fleeming v. Orr*, 2 M'Q. 14 (1855). See 19.

91. An objection in a bill of exceptions allowed to be argued on appeal, though it had been abandoned in the Court below. — *Bain v. Whitehaven Ry. Co.* 7 S. Bell, 79; 3 H. L. Cas. 1 (1850). See 159.

92. An objection not stated below argued in the House. *N.B.*—It is not noticed in the judgment. — *Irvine v. Kirkpatrick*, 7 S. Bell, 186 (1850).

93. When two parties are at one in regard to one point of their respective cases, they can only be heard on that point by one counsel each. — *M'Craw v. Cunningham*, 2 S. & M'L. 798 (1837).

94. When there are two respondents with conflicting interests, each is heard by two counsel, but only one party will be heard so far as the interests are identical. — *South Leith v. Allan*, 1 M'Q. 93; 1 Stu. 651 (1852); Aff. 11 D. 1391.

95. The law of England is properly ascertained by a case submitted to English counsel, but the House of Lords will review their opinion. — *Trotter v. Trotter*, 3 W. & S. 407; 4 Bligh, N. S. 502 (1829); Aff. 5 S. 78.

96. The House will correct, of its own knowledge, an error in English law contained in an opinion of English counsel on which the Court of Session had proceeded. — *Stein's Assignees v. Brown*, 5 W. & S. 47; 2 Dow & Clark, 171 (1831).

97. The House is not bound by an opinion of an English barrister obtained by the Court below on a question of English law, or even ecclesiastical law, but will decide for itself. — *Macpherson v. Macpherson*, 1 M'Q. 243 (1852); *Geils v. Geils*, 1 M'Q. 255; 2 Stu. H. L. 13 (1852); Aff. 13 D. 321.

See BANKRUPTCY, 37.

VIII. JUDGMENTS AND REMITS.

98. An appeal presented at such a time as to cause delay in giving a charge on a bond, after which interest would have run, dismissed with a direction that the Court of Session should give the respondent decree for a sum equal to the interest that would have accrued. — *Sinclair v. Sinclair, Robert*. 59 (1713); Aff.

99. The House, in affirming a decree of reduction on some of the grounds assigned in the Court below, will reverse as unnecessary so much of the interlocutor as rests on other grounds. — *Billers v. Duke of Norfolk*, Cr. & St. 255 (1739).

100. An order made by the House that the Court of Session should

account for their conduct for judging in cases where they had no jurisdiction (15th Feb. 1719–20), Robert. 297. See many cases of jurisdiction under the Stats. of forfeiture, *loc. cit.* See also a reference to the English judges to consider whether the Court of Session had jurisdiction in a particular case. — *Grierson v. Lagg*, Robert. 302 (1720).

101. On inspection of an original deed in the argument on appeal a marginal note was discovered. Case remitted to the Court to consider the effect on their judgment of such note. — *Duke of Hamilton v. Douglas*, 2 P. 449 (1779).

102. The House refused to allow a remit to the Court of Session to admit an allegation to proof as *res noviter* a fact which had occurred twenty years before, and without explanation of the circumstances under which it had not been discovered sooner. — *Campbell v. Anderson*, 3 W. & S. 384; 4 Bligh, N. S. 513 (1829); Aff.

103. On a remit to receive further evidence, all questions of the competency of the evidence, or its nature, or the period of its production in the suit, reserved. — *Clark v. Gordon*, 3 P. 61 (1787).

104. In an appeal on an objection to the title of the pursuer, the House ordered the action to proceed, and gave instructions for an account to be taken of the amount of the defender's liability, on the footing laid down in the judgment of the House. — *Gordon v. Douglas*, 3 P. 428 (1795).

105. The House will not remit if its judgment agrees with that of the Court below, though it dissent from the reasons given below. — *Young v. Leven*, 4 Dow, 138 (1816).

106. On hearing the main question involved in a suit, the House will give such orders as may be necessary on all collateral matters involved, whether they were discussed in the Court below or not. — *Stewart v. Agnew*, 1 S. Ap. 413 (1823); Rev. 2 S. 64. See 104, 110, 114.

107. Observations on the practice of remitting cases to the Court below for further consideration. — *Dewar v. M'Kinnon*, 1 W. & S. 161 (1825); Aff. See also Game, 4.

108. On an appeal from a judgment disallowing a bill of exceptions, the House of Lords may consider the whole case, and order a new trial, even though it holds the exceptions properly disallowed. — *Allardice v. Robertson*, 4 W. & S. 102 (1830).

109. Approval of an offer of composition by the bankrupt being refused by the Court, on the ground of insufficient concurrence, and the bankrupt appealing, and the counsel for the creditor opposing having stated that he was instructed not to support the judgment or resist the appeal, the House reversed the judgment, but remitted to the Court to grant a scrutiny of the votes, if demanded by any opposing creditor. — *Brown v. Ewing*, 4 W. & S. 123 (1830); Rev. 6 S. 739.

110. A party appealing the whole cause is liable to have interlocutors reversed which had, by consent of the other party, been pronounced partly in his favour, and cannot then revert to the consent. — *Keble v. Graham*, 4 W. & S. 166 (1830); *Aff.* 6 S. 119.

111. The House may order a question which has been decided by the Court of Session to be tried by a jury, but it will not if it agrees with the decision of the Court, the parties not having applied before the decision to have the case tried by jury. — *M'Gavin v. Stewart*, 4 W. & S. 184 (1830); 6 S. 738; *Pentland v. Lady Gwydir*, 4 W. & S. 322; 7 Bligh, N. S. 453 (1830).

112. Although a document may have been produced improperly in evidence before the Court, yet, if it has disregarded it, there is no occasion for a remit, though if it had been before a jury, there must have been a new trial, as it could not be ascertained whether the jury had been influenced by it. — *Pentland v. Lady Gwydir*, 4 W. & S. 322; 7 Bligh, N. S. 453 (1830); *Aff.* See 41—Action, 125.

113. A remit made to the Court of Session, to consider whether the manager of a company could be examined in regard to a claim made on the company in respect of alleged actings by him, and if competent, to examine him. — *North British Insur. Co. v. Barker*, 6 W. & S. 323 (1833).

114. If the pleadings enable a party to raise a question, it may be considered in the House of Lords though not argued in the Court below; but a fact stated in the summons, if not repeated in the condescendence, cannot be considered, and the pleas in law cannot be referred to, to supply the defect of statement. — *Luke v. Mags. of Edinburgh*, 6 W. & S. 241 (1832); *Aff.* 10 S. 307.

115. A judgment embodying an arrangement of the parties, allowed to be withdrawn some days after on payment of costs. — *Baillie (Clyne's Trs.) v. Edin. Oil Gas Co.*, 2 S. & M'L. 263, n. (1837).

116. The House does not of itself declare rights, and therefore, when necessary in an appeal in a declarator, it will remit to the Court to give decree of declarator as the House directs. — *Tailors of Aberdeen v. Coutts*, 1 Robin. 341 (1840).

117. The House, in remitting, may direct the Court to determine as to the costs of the appeal. — *Univ. v. Faculty of Physicians, &c. of Glasgow*, 2 S. & M'L. 275; 1 Robin. 397; 7 Cl. & Fin. 958 (1840); *Aff.* 15 S. 736. See 151, 177.

118. In an action for damages by a tenant for injury done by game, the Sheriff, under a variety of findings in fact after a proof, gave damages, the landlord advocated, and the Court remitted simpliciter. Held that as the Court did not specifically adopt all the findings in fact of the Sheriff, it ought to have specified the matters of fact which

it held proved, and, not having done so, the case could not be argued on the merits on appeal, but the interlocutor must be reversed and the case remitted. — *Wemyss v. Wilson*, 6 S. Bell, 394 (1849); Rev. 10 D. 194.

119. In remitting to take the opinion of the whole Court, the House may give leave to open up the closed record by consent of both parties. — *Edinburgh and Glasgow Ry. Co. v. Mags. of Linlithgow*, 1 M'Q. 1 (1851).

120. On an appeal against issues, the House remitted to the Court to decide the case on the pleadings and documents in process, with certain admissions made at the bar of the House, and also to decide on all questions of expenses, including those of the appeal. — *Cullen v. Black*, 1 M'Q. 374 (1852); Rev. 13 D. 1114.

121. When the Court has erroneously assumed a question of fact, remit to consider it. — *Earl of Kintore v. Union Bank*, 4 M'Q. 465 (1862).

122. After judgment in the House against the pursuer in a declarator of marriage, the House refused to remit to the Court to allow a reference to the defender's oath. — *Yelverton v. Yelverton*, 4 M'Q. 743 (1864).

123. When the House is equally divided the appeal is dismissed, and the decision affirmed without re-argument before a larger number of Peers. — *Finnie v. Glasgow and S. W. Ry. Co.* 2 M'Q. 117; *Norton v. Stirling*, 2 M'Q. 205 (1855); *Mays v. Presbytery of Dundee*, 4 M'Q. 228 (1861). See also House of Lords, 5.

IX. COSTS.

1. Of Appeal. (a.) On Affirmance.

124. Costs of appeal not given on the ground of the hard case of the appellant, though the case was called by Lord Mansfield "the clearest that ever came before the House." — *Lawrie v. Macghie*, 2 P. 309 (1773).

125. Per Lord Thurlow: "I am seldom inclined to give costs on appeals." — *Forster v. Paterson*, 4 P. 295 (1802). Costs given only where conduct of appellant was blamable. — *W.S. v. S.S.C.*, 4 P. 326 (1802).

126. Refused on affirming where the Court had altered their original interlocutor. — *Earl of Wemyss v. Carnegie*, 5 P. 219 (1808).

127. If a party who might, by petition to the Appeal Committee, have had an appeal dismissed as incompetent, puts in his answer, he will not be entitled to costs. — *Agnew v. Dunlop (Sheuchan)*, 6 P. 63 (1814).

128. Costs not given when an appeal and cross-appeal were both dismissed, the one being on the question of right, and the other a question of fact limiting the right. — *Fleishers of Glasgow v. Nelson*, 3 W. & S. 209; 3 Bligh, N.S. 384 (1828).

129. Costs refused on the ground of misrepresentation in the contract sued on, though it was not enough to avoid the contract. — *Geddes v. Pennington*, 6 P. 312; 5 Dow, 159 (1817).

130. Costs given against a contractor suing for balance of work done, and obtaining it, subject to countercharges for defective work or damages, the amount subject to such deductions having been previously offered. — *Strachan v. Paton*, 3 W. & S. 19; 3 Bligh, N.S. 359 (1828); *Aff.* 3 S. 259.

131. No costs given where the interlocutor was affirmed in substance, but an appeal was necessary in order to have a declaration made not contained in the interlocutor, though admitted in the pleadings. — *Maule v. Ramsay*, 4 W. & S. 58 (1830). See 157, 159.

132. Costs modified where the judgment was affirmed, but the appellants were trustees of a charity. — *Heriot's Hospital v. M'Donald*, 4 W. & S. 98 (1830).

133. Where the Court, though unanimous, have given leave to appeal, costs not given. — *Duff v. Fraser*, 5 W. & S. 57 (1831).

134. Costs not allowed, either in the Court of Session or the House, against a party unsuccessful in both, but who had honourably undertaken to discharge debts for which no legal liability existed, and incurred an obligation exceeding in amount what was contemplated, in consequence of which the litigation arose. — *Lady Montgomerie v. Rundell*, 5 W. & S. 201; 2 Dow & Clark, 297 (1831).

135. Costs not given where a word in the respondent's title-deeds had been wrongly transcribed. — *Mackenzie v. Ross*, 6 W. & S. 31 (1832).

136. Costs refused though the Court had been unanimous, where there was a prior conflict~~ed~~ decision. — *Ewing v. Wallace*, 6 W. & S. 222 (1832).

137. Costs refused though the Court had been unanimous, but the question was subject to considerable doubt. — *Dixon v. Dixon*, 6 W. & S. 229 (1832); *Earl of Mansfield v. Scott*, 6 W. & S. 277 (1833).

N.B.—Costs often not given at this period (1832) where the case difficult, hard on one party, or causing division on the bench.

138. The practice of giving taxed costs on appeal, instead of a fixed sum, referred to by Lord Wynford as of recent introduction. — *M'Millan v. Campbell*, 7 W. & S. 455 (1834).

139. Costs given against an appellant, though he had been in part successful in the appeal, his conduct having been litigious. — *Baillie (Clyne's Trs.) v. Stewart*, 2 S. & M'L. 45 (1835).

140. Unless there is a good case the costs of an unsuccessful appeal should always be given. (Per Lord Lyndhurst.) — *Milne v. Robertson*, 2 S. & M'L. 529 (1837).

141. Costs of appeal not allowed to a party who did not appear to the appeal, but presented his printed case at the bar of the House, and was then allowed to be heard, though the House was of opinion that it would

have decided in his favour though the case had been heard merely *ex parte*. — *Clyne's Trs. v. Clyne, M'L. & R.* 72; 7 *Cl. & Fin.* (1839).

142. In an action of constitution by the cautioner for a composition against the bankrupt in which personal decree was not sought, held that expenses were properly given to the cautioner in the Court below, although the bankrupt was on the poor-roll, but that costs could not be given on the affirmance on appeal. — *Barry v. Waddell, M'L. & R.* 759 (1839). See 205.

143. Costs refused on an affirmance, where the judges in the Court below were divided. — *Tennant v. Forth and Clyde Nav. Co., 1 Robin.* 65 (1840).

144. Costs should always be given on affirmance, irrespective of pleas of hardship. (Per Lord Cottenham.) — *Stewart v. Menzies, 2 Robin.* 547 (1841); 8 *Cl. & Fin.* 309.

145. When personal charges are made against a party which are not substantiated, costs will not be allowed against him, though he may lose the case on other grounds. — *Tailors of Aberdeen v. Coutts, 1 Robin.* 296 (1840).

146. Costs reserved on a remit. Not given in a case of great difficulty and difference of opinion. — *Fogo v. Mather, 2 Robin.* 440 (1841); 2 *S. Bell*, 195 (1843).

147. Costs not given on affirmance where there had been a conflict of decisions below. — *Fraser v. Lord Lovat, 1 S. Bell*, 128 (1842).

148. Costs not given on an appeal from an interlocutor disallowing a bill of exceptions when one exception is allowed. — *Househill Co. v. Neilson, 2 S. Bell*, 1; 9 *Cl. & Fin.* 788 (1843); 5 *D.* 86.

149. The Court ought not to give leave to appeal except on a point really doubtful; but when leave is given, costs will not usually be given in the House on affirming. — *Walker v. Wedderspoon, 2 S. Bell*, 57 (1843).

150. When in an arranged verdict the amount of damages is by accident stated at double its true amount, costs refused to the respondent on affirming. — *Williamson v. Advocate-General, 2 S. Bell*, 89; 10 *Cl. & Fin.* 1 (1843).

151. After a remit, the costs given include those prior to as well as subsequent to the remit. The narrowness of a majority in the Court below does not affect costs. — *Duke of Hamilton v. Mags. of Hamilton, 7 S. Bell*, 1 (1850). See 117, 155.

152. When the Court is equally divided, and one of the judges withdraws, in order that the decision of the Lord Ordinary may be affirmed, costs not given on affirmance. Observed that in such a case the proper course is to consult the other judges. — *Maule v. Moncreiffe, 5 S. Bell*, 333 (1846).

153. The House will not look at the short-hand notes of the Judges' speeches in order to ascertain whether probably one of the Judges withdrew his opinion, unless the fact is distinctly stated. — *Cleland v. Weir*, 6 *S. Bell*, 402 (1849).

154. On the terms of an alleged agreement respecting costs being disputed, the House will, in affirming, make the usual order for costs, the agreement, if it exists, not being affected by it. — *Hastings v. Marquis of Hastings*, 6 *S. Bell*, 30 (1837).

155. Not given in a special case where the Court below was divided seven to six, and had not given expenses, and expressed a desire that it should be appealed. — *Dewar v. Cleghorn*, 7 *S. Bell*, 32 (1850).

156. Costs not given on affirmance where the question turned on the interpretation of a statute on which it was reasonable that the judgment of the House should be sought, although the judgment both in the Court and the House was unanimous. — *Murray v. Grant*, 1 *M'Q.* 178 ; 1 *Stu.* 1069 (1852) ; 12 *D.* 201.

157. Given on affirmance though with a variation, but which the Court below might have made had it been applied to by the appellant. — *Dundee Harbour Trs. v. Dougal*, 1 *M'Q.* 317 ; 1 *Stu.* 660 (1852).

158. When an interlocutor of the Court below is so far obscure as to justify appeal, costs not given though it is affirmed. — *Wishart v. Wylie*, 2 *H. L. St.* 68 (1853).

159. Costs refused when a plea was argued in the House contrary to an admission in the Court below. — *Shaws Water Co. v. Mags. of Greenock*, 2 *M'Q.* 151 (1855).

160. Although on one or other of the points raised the majority of the Judges of the Court were in favour of the appellants, and the effect of the action, as decided on appeal, was to enable the respondent to make a better title than he could otherwise have done, yet costs given on affirmance. — *Martin v. Kelso*, 2 *M'Q.* 556 (1857), 15 *D.* 950.

161. When the Judges in the Court below had been divided, and the Peers were also divided, no costs allowed on affirmance. (Per Lord Cranworth)—Such is not the universal rule. — *Kippen v. Darley*, 3 *M'Q.* 203 (1858). See 167.

162. Costs not given in dismissing an appeal as incompetent where there was a doubt arising from a discrepancy of prior decisions. — *Scots Mines Co. v. Leadhills Mining Co.* 3 *M'Q.* 743 (1859).

163. When one interlocutor is affirmed, and a finding in a second varied, the House affirms the first with costs, and remits the second with a declaration. — *Mags. v. Presbytery of Dundee*, 4 *M'Q.* 228 (1861).

164. Costs not given in affirming an interlocutor in multiplepinding by the Inner House which reversed a decision of the Lord Ordinary, but proceeded on an amended claim, the parties ultimately successful

having at first lodged a claim based on erroneous view of the law. No reason given by the House for refusing costs. — *Ralston v. Hamilton*, 4 M'Q. 297 (1862).

165. The Lord Advocate was not liable for costs in a suit respecting Crown or public rights, whether it was brought in the name of commissioners of a public board or otherwise, and consequently was not bound to enter into recognisances on an appeal. — *Lord Advocate v. Lord Douglas*, 1 S. Bell, 93; 9 Cl. & Fin. 173 (1842); Rev. 15 S. 314.

166. Though the Crown is now (19 and 20 Vict. c. 56, § 23) liable for costs, they were not given against it where, though the appeal by it was dismissed, the respondent had acted litigiously. — *Advocate-General v. Comrs. of Supply for Edinburgh*, 4 M'Q. 387 (1862); 23 D. 933. See 203.

167. Costs given although the Peers were divided, and the Court had been almost equally divided. — *Duke of Montrose v. Stewart*, 4 M'Q. 499 (1863); *Campbell v. Campbell*, 4 M'Q. 711 (1864). See 161. See PROCEDURE ON OBJECTION TO COMPETENCY, ante—ARBITRATION 3.

(b.) Costs on Reversing.

168. Opinion expressed that though on reversal no costs could be given, yet the appellant, in the particular circumstances, ought to pay them. — *Maule v. Maule*, 6 W. & S. 586 (1833).

169. Costs of an appeal to the effect of having an error in the interlocutor below amended, will not be allowed to the respondent, when the error really exists, though it might have been amended in the Court below if the objection had been taken there. — *M'Aulay v. Adam*, 1 S. & M'L. 665; 3 Cl. & Fin. 385 (1835). See 157.

170. Costs will not be given on reversal, though the point has been already decided by the House, if the respondent merely stands upon the judgment in his favour, without appearing to support it, and without fraud. Cases cited in which costs given on reversal. — *Hamilton v. Littlejohn*, 4 Cl. & Fin. 20 (1836). See 174, 175, and Husband and Wife, 77.

2. Costs out of Estate.

171. Costs allowed out of a trust fund when the question arose in consequence of the imperfect expressions contained in the deed. — *Earl of Stair v. Earl of Stair's Trs.*, 2 W. & S. 414, 614; 1 Bligh, N.S. 662 (1827).

172. Costs given out of a trust estate, so far as necessary, to have a question respecting its constitution decided, but not including expense of special retainers in bringing up counsel to argue a plain case. — *Earl of Strathmore v. Strathmore's Trs.*, 5 W. & S. 199 (1831).

173. Full costs and charges of both parties, as between solicitor and client, ordered to be paid out of the estate, the subject of a charitable desire, and in respect of which a question had been raised by the heir. — *Cameron v. Mackie*, 7 *W. & S.* 104 (1833); *Aff.* 9 *S.* 601.

174. Costs allowed out of the estate on reversal, where the difficulty arose from the inaccurate penning of the will. Costs in Court below to be repaid. — *Mags. of Dundee v. Morris*, 3 *M.Q.* 134 (1858). See *Will*, 8.

175. Costs on reversal in a charity suit allowed out of the fund to both the beneficiary who sued and the governors who were sued, but costs not allowed to one of the body of governors who sued the rest. — *Clephane v. Mags. of Edinburgh*, 4 *M.Q.* 603 (1864); 22 *D.* 1222.
See CHARITY, 4, 7—VESTING, 5.

3. Costs below.

176. Costs having been refused to the successful party, the House ordered the Court to have them taxed and allowed. — *Cochrane v. Lord Blantyre, Robert*. 558 (1726); *Alt.*

177. After an action not concluding for costs is disposed of, the successful party may apply by petition to the Court of Session for costs; and if the House remits to the Court to tax costs, this means only those before the Court, and not before the House; but if insufficient costs are taxed by the Court, the House will review and alter the taxation. — *Lyon v. Earl of Aboyne, Robert*. 154 (1715). *But see* 185.

178. A co-defender in an action of spulzie, being assolizied, held entitled to present a petition for his costs, even after extracting the decree in his favour, which did not mention costs. — *Munro v. Mackenzie, Robert*. 477 (1724); *Rev.*

179. A debtor having *bona fide* paid his debt to the creditor's clerk on being served with a summons, and having offered to pay expenses, but which were not accepted by the clerk, the creditor's agent is not entitled to proceed with the action for the purpose of getting his costs. Appeal allowed from decree for costs in such case. — *Batson v. Jamieson*, 4 *P.* 27 (1799); *Rev.* See *Law-Agent*, 1, 2.

180. A tender of payment must be unconditional, in order to fix expenses of the action on the opposite party; but if made subject to counter-claims which are not sustained, the tender will not affect the question of expenses. — *Brodie v. Sinclair*, 5 *W. & S.* 567 (1831); *Rev.* 9 *S.* 36.

181. The House of Lords' judgment reversing an interlocutor which gave expenses, entitles the appellant to repayment of them. — *Davidson v. Lockwood*, 2 *S. Ap.* 357 (1824).

182. When a defender, after denying his liability, in part admits it, he is liable in costs up to that date, though he is ultimately successful on the remaining parts of the case. — *Hunter v. Duff*, 6 W. & S. 206 (1832); *Alt.* 9 S. 703.

183. A case being remitted with a declaration, and the interlocutors, so far as inconsistent therewith reversed, the reversal does not apply to a finding respecting expenses not specially mentioned. When a new record is made up on the points remitted, the old record cannot be referred to as if it were part of it, but may be used as evidence. — *Grahame v. Jolly*, 2 S. & M'L. 24 (1835); *Aff.* 12 S. 789.

184. After a remit, the Court of Session may grant the expenses incurred prior to the appeal. — *Dick v. Cuthbertson*, 5 W. & S. 712 (1831); *Aff.* 9 S. 93.

185. Expenses not having been moved for at the time of pronouncing an interlocutor by the Court of Session, it is incompetent to apply for them by petition presented afterwards. — *Bremner v. Kerr*, 2 S. & M'L. 895 (1837); *Aff.* 14 S. 180. *But see* 177, 178.

186. A party on the poor-roll is entitled to expenses so far as actually incurred. — *Clyne's Trs. v. Clyne*, M'L. & R. 72; 6 Cl. & Fin. 539 (1839). *See* 205.

187. A declaration made that costs in the Court below should not be allowed where the House reversed, but there had been some course of practice in favour of the decision below. — *Duncan v. Findlater*, M'L. & R. 912; 6 Cl. & Fin. 894 (1839); 16 S. 1150.

188. The House will not alter the order of the Court below as to costs there, on the question being brought up by a cross-appeal, even though it may think it not correct. — *Horne v. Pringle*, 2 Robin. 384; 8 Cl. & Fin. 264 (1841).

189. Where the defender resists the whole claim, he is liable in full costs, though the pursuer succeeds only in part. — *Porterfield v. Corbet*, 1 S. Bell, 476 (1842); *Aff.* 2 D. 573.

190. On reversal the costs below given, though there was a difference of opinion in the Peers. — *Convention of Burghs v. Cunningham*, 1 S. Bell, 628; 9 Cl. & Fin. 144 (1842); 1 D. 1077.

191. When the Inner House reverses an interlocutor of the Lord Ordinary, and the House of Lords reverts to the Lord Ordinary's interlocutor, it will give the costs in the Inner House. — *Mackersey v. Ramsay*, 1 S. Bell, 30; 9 Cl. & Fin. 818 (1843); 2 D. 1003.

192. On reversing a judgment of the Inner House and Lord Ordinary, the costs in the Court of Session given. — *Gardner v. Scott*, 2 S. Bell, 129 (1843); 2 D. 185.

193. On reversal, costs in the Court below given. — *Ellis v. Henderson*, 3 S. Bell, 1 (1844).

194. Costs below refused on reversal, where the appellant was morally, though not legally, liable to the action — *Rennie v. Ritchie*, 4 S. Bell, 246 (1845).

195. On reversal of a judgment proceeding on the verdict of a jury, the ground of reversal being that the action was irrelevant, and ought not to have been sent to a jury, the appellant is entitled to receive back all costs already paid by him in the Court below, except such as were given by an unappealable order. The appellant is also entitled to all other costs in the Court below, including those of the jury trial. — *Irvine v. Kirkpatrick*, 7 S. Bell, 186 (1850); 10 D. 367.

196. On reversal, returning to the judgment of the Lord Ordinary, costs of the reclaiming note given against the reclaimers although there was a fund in Court. — *Scott v. Sandeman*, 1 M'Q. 293; 1 Stu. 882 (1852); 11 D. 405.

197. Expenses in the Court below not given on reversal, where the appellant had misled the respondent by putting his case on a wrong issue. — *Aberdeen Ry. Co. v. Blackie*, 1 M'Q. 461 (1853); 14 D. 66.

198. When an appellant has by inaccurate pleading misled his opponent, costs will not be allowed him on reversal. — *Fleming v. Orr*, 2 M'Q. 14 (1855).

199. On reversal, the costs in the Court below ordered to be paid to the appellant, although the Court had proceeded on English cases nearly the same, but which the House held distinguishable. — *Caledonian and Dumbartonshire Ry. v. Mags. of Helensburgh*, 2 M'Q. 391 (1855); 15 D. 148.

200. On reversing costs received ordered to be repaid, but costs (in the Court below) not given where former cases had warranted the respondent in expecting to succeed. — *Bartonshill Coal Co. v. Reid*, 3 M'Q. 266.

201. Costs ordered to be repaid, but not given (in the Court below) on reversing a unanimous judgment. — *Scottish N. E. Ry. Co. v. Stewart*, 3 M'Q. 382 (1859); 18 D. 540.

202. When the Court unanimously reversed the Lord Ordinary's interlocutor, but the House returned to it, an order was made that the Court ought to have dismissed the reclaiming note with expenses, and that the costs paid by the appellants should be returned. — *Commercial Bank v. Rhind*, 3 M'Q. 645 (1860); 19 D. 519.

203. On reversal, costs in the Court below given against the Crown. — *Lord Saltoun v. Adv. General*, 3 M'Q. 659 (1860).

204. On reversal of a case which had been remitted, costs in the Court below not given. — *Edinburgh and Glasgow Ry. Co. v. Mags. of Linlithgow*, 3 M'Q. 691 (1859).

205. Costs in the Court below given on reversal (as a general rule)

though appellant a pauper. — *Galloway v. Craig*, 4 M'Q. 267 (1861); 22 D. 1211. See 142, 186.

206. Costs below given on reversal, though the decision there was founded on an objection started by the Court itself. — *Whitehead v. Galbraith*, 4 M'Q. 283 (1861); Rev. 23 D. 265.

See LAW, ADMINISTRATION OF, 4.

X. COSTS, ENFORCEMENT OF.

207. Costs allowed by the House of Lords not being paid, the House orders the Court of Session to enforce payment in the same way as if given by it. — *Lord Kinnaird v. Riddoch*, Robert. 11, (1711). See also *Kennedy v. Cuming*, Robert. 19 (1711).

208. When, on remit to the Court to tax costs, a petition complained that the Court failed to proceed in taxing them, a committee of the House appointed to inquire, which reported that the Court had rightly proceeded. — *Habkin v. Hog*, Robert. 147 (1715).

209. Costs in the Court of Session being given in the House of Lords, a Committee was appointed to tax them on a petition, stating that the Court of Session had not duly done so. Costs of such taxation not allowed where some extravagant charges made. — *Maxwell v. Sharp*, Robert. 380 (1721).

210. There is no failure to pay costs until they are demanded by the party, or his attorney specially authorised; but on failure after such demand, the House will order them to be paid peremptorily, or the bond for costs to be escheated into the Exchequer. — *Cuming v. Pantoun, Robin*. 582 (1826).

211. Under the ordinary remit to enforce payment of costs, it is the duty of the Court to give decree for them, with power of using diligence thereon. — *Whitehead v. Galbraith*, 4 M'Q. 283 (1861); Rev. 23 D. 265.

APPROBATE AND REPROBATE.—See FOREIGN DEED AND WILL—

DEATHBED—SUCCESSION.

APPRENTICE.—See MASTER AND SERVANT.

ARBITRATION.

I. EXTENT OF REFERENCE,	p. 46	III. DECREE,	p. 48
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I. EXTENT OF REFERENCE.

1. A clause in a building contract referring all disputes relative to its execution to arbitration, which should be final, does not exclude one of the parties from refusing to submit a question, and bringing an

action to enforce performance of the contract. — *Milne. v. Mags. of Edinburgh*, 2 P. 209 (1770); *Alt.* See Partnership, 19, 42.

2. A tenant having been removed before expiry of the lease, and he and the landlord having entered into a general submission of all claims and differences between them, the arbiter is entitled to pronounce an award on a claim for meliorations by the tenant, and for damages for non-repair of buildings by the landlord, although no such claim was authorised by the lease. — *Pitcairn v. Drummond*, 1 W. & S. 194 (1825); *Aff.* 1 S. 431.

3. Where, in an action of accounting against a shopman respecting transactions amounting to L.40,000, a reference was made with power to the arbiter to settle all questions of liability, "and that the losing party is to be ordered by the referee to pay all the costs," and the arbiter found the defender liable to pay L.4 as unaccounted for, and considering, on the whole, the pursuers to be the losing party, ordered them to pay all the costs; the House affirmed the order in the particular circumstances, with a proviso that it should not form a precedent. Costs of appeal not given to either party. — *Gye v. Haldane*, 1 S. & M'L 747 (1835); *Aff.* 12 S. 311.

4. An arbiter in an extrajudicial submission may give expenses without express power in the submission. Otherwise in England. — *Ferrier v. Alison*, 4 S. Bell, 161 (1845); *Aff.* 5 D. 456. See 8.

5. In a submission to arbitration respecting the amount of certain debts, and with power to the arbiter to take proof instructing them, the arbiter may give effect to an objection of fraud, though he has not express power to decide that question. — *Earl of Kintore v. Union Bank*, 4 M'Q. 465 (1862); *Aff.* 24 D. 59.

6. A judicial reference of "this action, and all questions between the parties," embraces only the questions actually raised and capable of being decided in the action. A party cannot object to a reference made by his counsel. — *Baillie (Clyne's Trs.) v. Edin. Oil-gas Co.*, 2 S. & M'L. 243 (1835); *Aff.* 10 S. 723.

See HUSBAND AND WIFE, 55.

II. PRACTICE IN.

7. A judicial reference is subject to the same rules of law as an extrajudicial submission, and the A. S. 29th April 1695 applies to both, and has the effect of a statute. — *Mackenzie v. Girvan*, 2 S. Bell, 43; *Aff.* 3 D. 318.

8. A power to prorogate being given to arbiters, it may be exercised by the oversman. — *Glover v. Glover*, 4 P. 655 (1805); *Aff.* See 12.

9. An arbiter expressly chosen for his knowledge of the case is not bound to take evidence tendered to him, and the award cannot be ob-

jected to on the ground that he derives an incidental advantage from it, in respect of circumstances known to the parties at the time of entering into the submission. A party to the submission, who has seen works in progress under it, cannot object to pay his share of the cost, on the ground that, at the time of its being prorogated, some of the other parties had not signed it. The award, in so far as containing matter *ultra vires* of the arbiter, may be amended by striking such matter out, without setting aside the remainder. — *Johnston v. Cheape*, 6 P. 339 and 342; 5 Dow 247 (1817); *Alt.*

10. Although a submission had not been acted upon for a year, the Court, in an action brought to enforce the claim submitted, may remit to the same arbiters as those named in the submission to ascertain the facts, and on their differing in opinion may remit to a third party. — *Earl of Elgin v. Halkett*, 1 S. & M'L. 629 (1835); *Alt.* 9 S. 412.

11. Although an arbitration may be stopped by decree in an action of declarator founded on corruption, or some other ground of nullity, an objection, founded on the examining of witnesses not in presence of the parties, having been virtually waived, will not support such an action, nor will the allegation that the arbiter has been discovered to have an interest in the solvency of one of the parties. — *Drew v. Drew*, 2 M'Q. 1 (1855); *Aff.* 14 D. 559.

12. Notes signed and issued while the submission is in force, but not converted into a formal decree till after it has expired, do not render the decree valid, nor does a prorogation by the oversman, to whom part of the case had been devolved, operate as a prorogation of that part which had not been devolved. Query, Whether the oversman can act as regards one part of the case, while the arbiters are still acting as regards another part? and opinion that at least this cannot be without express power in the submission. — *Lang v. Brown*, 2 M'Q. 93 (1855); *Aff.* 15 D. 38. *See* 14.

13. After a judicial reference, with power to the referee to report any point to the Court, it is incompetent for the Court, except by consent, on such report by the referee of a point of law, to take the determination of the facts out of his hands. — *Walker v. Stewart*, 2 M'Q. 424 (1855); *Rev.*

III. DECREE.

14. Parole evidence is admissible to contradict the statement of a decree arbitral that the arbiters had differed in opinion, and therefore the oversman was called on; but it is sufficient to support the decree by the oversman, if there has been a difference of opinion on one point material to the question. The decree may be set aside under the Act 1695, if it appears so partial as to amount to constructive corruption. — *Colquhoun v. Corbet*, 2 P. 626 (1784); *Rev.*

15. A question as to the conformity of goods to pattern having been submitted to arbitration, the decree cannot be set aside on the ground of the patterns having been found subsequently, it appearing that they had all along been in the possession or power of the party. — *Sharp v. Burys*, 5 P. 704; 1 Dow, 223 (1813); *Aff.*

16. When the arbiter called for, and believed he had received, and stated in his decree that he had received, a declaration by the parties that their proof was closed, but, in point of fact, one of the parties made no such admission, the decree was set aside on that party alleging that he had still important evidence to adduce. A case of special circumstances declared not to form a precedent. — *Sharpe v. Bickerdyke*, 3 Dow, 102 (1815); *Rev. F. C.*, 5 June 1810. *See* 9, 11, 19.

17. A decree arbitral, which appears from the evidence to have been merely a form adopted for embodying an agreement between the parties, is reducible on that ground. — *Maule v. Maule*, 6 P. 260 and 449; 4 Dow, 363 (1819); *Rev. F. C.* 2 Dec. 1817.

18. A decree arbitral, in which an alleged *error calculi* is considered by the Court to be really a misapprehension of the law applicable to the case, is not liable to be set aside. — *Morrison v. Robertson*, 1 W. & S. 143 (1825); *Aff.* *See* 20, 21, 22.

19. The following are not good objections to a decree arbitral:—1st, That it is signed by only two out of three arbiters, if it proceeds on the recital that the third differed in opinion; 2d, That the notes of the decree were not previously communicated to the parties; 3d, That one of them failed to bring one alternative of his case before the arbiters, in the expectation that they would decide in his favour on the other alternative, it appearing that both were included in the submission, and opportunity afforded for leading proof on both; 4th, That the arbiters did not go into the detailed accounts, the correctness of which they had power in the submission to ascertain, if it appears that neither party stated objection to the accounts — *Macallum v. Robertson*, 2 W. & S. 344 (1826); *Aff.* 4 S. 66.

20. A decree arbitral dealing with only part of the claim submitted is good where there are no counter-claims, though it would have been otherwise if there had been counter-claims which were neglected. — *MacLellan v. Macleod*, 4 W. & S. 157; 2 Dow & Clark, 121 (1830); *Aff.* 6 S. 790.

21. A decree arbitral does not become effectual till not merely signed but delivered to the parties, or otherwise placed on record; delivering to the clerk, with instructions to furnish copies to the parties, is not sufficient. — *Gray v. M'Nair*, 5 W. & S. 305 (1831); *Aff.* 5 S. 735.

22. When an arbiter shows the principle on which he makes his award, and the principle is incorrect in law, the Court can correct it,

but not if he merely awards a round sum without indicating the principle on which he arrives at the precise amount — *Earl of Elgin v. Halkett*, 1 S. & M'L. 629 (1835); *Alt.* 11 S. 203, 513. See 18.

23. When either on the face of a decree arbitral, or by connecting it with documents to which it refers, and which therefore it embodies, error in law appears, the award is bad. When it does not distinctly order each party to do what is fitting, but orders the one to perform his part upon the performance of a certain act by the other, it is bad. — *Baillie (Clyne's Trs.) v. Edinr. Oil-gas Co.*, 2 S. & M'L. 243; 3 Cl. & Fin. 639 (1835); *Rev.* 10 S. 723.

24. When a decree arbitral refers to notes issued before, they may be referred to, to ascertain whether the decree exhausted the case. An error in law in the decree does not invalidate it, unless the arbiter exceeded his jurisdiction. A reference by the arbiter in the decree to the opinion of a previous arbiter on a point of law does not invalidate the decree, provided the arbiter states his own concurrence in it. — *Mackenzie v. Girvan*, 2 S.; *Bell*, 43 (1843); *Aff.* 3 D. 318.

25. An award by an arbiter held to form *res judicata* against a subsequent action by the representatives of an heir of entail to have certain road bonds made a charge on the entailed estate. — *Fraser v. Lord Lovat*, 7 S. Bell, 171 (1850); *Aff.*

26. An arbitration under 8 and 9 Vict. c. 33, may, by consent of the parties, include farther powers to the arbiter than the statute gives. The parties may prorogate the statutory time, and confer on the arbiter a power of indefinite prorogation. The arbiter may remit to a person of skill for a report, may give a sum for possible damages from flood, and may direct that the company shall be relieved from the claims of tenants to the extent of interest on the sum awarded. The arbitration does not fall by death of the landowner. — *Caledonian Ry. Co. v. Lockhart*, 3 M'Q. 808 (1860); *Aff.* 19 D. 527.

See LANDLORD AND TENANT, 18—BANKRUPTCY, 64.

ARRESTMENT.

1. Arrestment in security is incompetent where for principal sums not payable for four years, and on which inhibition has been used. — *York Buildings Co. v. Meres*, Cr. & St. 10 (1728); *Rev.* M. 800.

2. A party receiving funds under an assignation in security, which funds are arrested in his hands, is entitled to hold them against the arrester for not only the debt which the assignation secured, but for all advances made before the arrestment, or which he had, before the arrestment, come under obligation to make. The assignee may prove

by the oath of the assignor that the advances were of this character. — *Clyne's Trs. v. Dunnet*, M'L. & R. 28 (1839); Aff. 11 S. 791.

3. Inhibitions and arrestments used against a trust-estate recalled in respect that the debt claimed could only affect the current year's rents, save by a possibility so remote that it was not stated in the summons. — *Stuart v. Carnegie*, M'L. & R. 192 (1839); Aff. 14 S. 670.

4. An arrestee paying *bonâ fide* to the original creditor after a regular arrestment, but in ignorance of it, is not liable to pay the debt over again to the arrester. Notice of the arrestment to the arrestee's agents is not notice to him, if they are not his agents for the purpose of receiving arrestments, and no one is bound on leaving home to appoint an agent for that purpose. — *Laidlaw v. Smith*, 2 Robin. 490 (1841); Aff. 16 S. 367.

ARRESTMENT JURIS. FUND.—*See* ACTION, 19.

ARREST FOR DEBT.—*See* MEDITATIO FUGÆ.

ASSIGNATION.

1. An unmarried woman having right to a bond not payable till after her marriage, and with a proviso that she should not assign the same, or the interest thereon, till the term of payment, may assign it in trust for herself to the effect of recovering arrears of interest. — *Sinclair v. Sinclair*, Robert. 59 (1713); Aff. *See* Husband and Wife, 59, 64.

2. A general assignation in a bond of so much of the debtor's readiest funds at his death as would pay the bond, gives no preference over other creditors, and cannot be made available without an action of constitution; but citation in such an action, and a decree sustaining process against the executor, is sufficient, without obtaining final decree of constitution, to give a title to a *pari passu* ranking with another creditor who commenced an action of constitution a month sooner, but had not yet obtained final decree, both actions being more than six months after the debtor's death. — *Gray v. Callander*, Robert. 483 (1724); Rev. M. 5003, 3140.

3. A creditor having assigned part of his debt, for which the assignee brought action against the debtor, and the creditor having *pendente processu* entered into an arrangement which, if legal, would have avoided the debt, it takes no effect against the assignee. — *M'Culloch v. M'Culloch*, Robert. 611 (1727); Aff.

4. A father having by deed assigned certain rents to his eldest son, and warranted the assignation from fact and deed, but declared it revocable by writ under his own hand, it is not revoked by instructions to his factor not to pay over the rents to the son, but it is revoked by a deed found after his death in his repositories, and the

revocation operates from the date of the deed. — *Marchioness Dowager v. Marquis of Anandale, Robert*. 417 (1722); *Alt.*

5. The onerous assignee of a bond is not liable to compensation in respect of receipt by the cedent of goods from the debtor which did not belong to him, but were forfeited to the Crown, but for which the cedent had paid the debtor full value. — *Comrs. of Forf. Estates v. Erskine, Robert*. 368 (1721); *Aff.*

6. An assignation of a claim, which is afterwards found to be invalid, the consideration for the claim also failing, does not bind the assigner to pay the amount to the assignee. — *Lady Forbes v. Lord Forbes*, 2 P. 36 (1760); *Aff.* See 8.

7. A sum of money given by a son in India to a person returning home, with instruction to hand it to his father, held to be transferred absolutely, although the son died before the money was actually given to the father. — *Bruce v. Stewart*, 3 P. 150 (1798); *Aff.*

8. An assignation in security being made subject to conditions in a separate letter, a transfer of it made under circumstances sufficient to call for inquiry on the part of the new assignor whether conditions were attached or not, subjects him to the original conditions. Observed by Lord Redesdale, that an engagement to execute an assignation, if without consideration, is void. An objection as to want of a stamp, made by Lord Eldon, not pressed. — *Grant v. Campbell*, 6 Dow, 239 (1818); *Rev.* See Law-Agent, 13.

See ACTION, 7, 8—EXECUTOR, 1—HUSBAND AND WIFE, 44—
PARTNERSHIP, 53–57.

ASSIGNATION, INTIMATION OF.

9. Intimation by the agent of the assignor to, and entered in the books of the agent of the debtor, is equivalent to notarial intimation. — *Earl of Aberdeen v. Earl of March*, 1 Cr. & St. 44 (1730); *Rev.* See Foreign, 1.

10. A. having assigned to his creditor B. a sum belonging to him in the hands of C., to whom intimation of the transaction is made, and having afterwards directed C. to pay the same sum to D., which is done, and B. having then, under threat of legal proceedings, compelled payment to him of the sum by C., the latter is not entitled to recover it back from B. — *Gordon v. Hughes*, 2 S. Ap. 310 (1824); *Rev.* 2 S. 230. But C. is entitled to recover the amount from A. (Per Lord Gifford in *Hyslops v. Gordon*, 2 S. Ap. 458.)

11. Intimation is not necessary to complete an assignation of his share by one partner to the only other partner, unless the assignation is not at once acted upon, and then notice that it is intended for the future to be acted on is sufficient. Query, Whether, on a lease being assigned to the landlord, intimation is necessary to complete the right as against

the tenant's creditors. — *Russell v. Earl of Breadalbane*, 1 W. & S. 620 (1825); 5 W. & S. 256 (1831); Aff. 2 S. 62, 5 S. 891.

See ARRESTMENT, 2—LANDLORD AND TENANT, 42, 43, 44.

BANK.

1. The Bank of Scotland is subject to summary diligence upon its bills or notes. — *Royal Bank v. Bank of Scotland*, Cr. & St. 14 (1729); Rev. M. 875. See as to this Bank—ALIEN, 2.

2. The Royal Bank of Scotland has lien over the stock held by one of its shareholders for a debt due by a company of which he is partner, which is preferable to the claims of the creditors of the company. — *Hotchkis v. Royal Bank*, 3 P. 618, 6 Br. P. C. 465 (1797); Aff. M. 2673.

3. A bank is bound to pay the amount represented by its notes, though the halves only are presented, on receiving satisfactory security against loss, and payment of the cost of issuing new notes, if it appears that the notes had been cut for safety in transmission, and not maliciously, and that the other halves had been lost or stolen. In such case a proving of the tenor is not necessary. — *Maberley v. Bank of Scotland*, 1 W. & S. 10 (1825); Rev. 1 S. 360.

4. A bank manager, on being dismissed in terms of the method provided in the contract, without reasons assigned, is not entitled to compensation on the ground of having been induced to leave his profession to become manager. — *Commercial Bank v. Pollock*, 3 W. & S. 430; 4 Bligh, N. S. 543 (1829); Aff.

5. An issue ordered to be tried by a jury, whether a bank had received a transfer of funds in its hands made by an executor for payment of his own debt to the bank, and had received it knowing that the funds belonged to him as executor, and subject to the trusts of the will, and that the said trusts were not satisfied. — *Taylor v. Forbes*, 4 W. & S. 444; 7 Bligh, N. S. 417 (1830); Rem. 5 S. 785. See 7.

6. A bank receiving a bill or draft from a customer in order to its transmission for payment becomes liable for the amount, with usual interest from the time the sum is paid to their agent or sub-agent. — *Mackersy v. Ramsay*, 2 S. Bell, 30; 9 Cl. & Fin. 818 (1843); Rev. 2 D. 1003.

7. The balance due a customer on his account with a bank may be set off against his debts to the bank, without any inquiry as to whether the sum standing at his credit is made up of money belonging to himself absolutely or in trust. — *Drummond v. Ross*, 3 S. Bell, 87 (1844); Aff. 3 D. 698. See 5.

8. The pass-book of a customer with a bank is not a probative writ as against the bank, and therefore, in an action for the balance, it is

competent to prove that an error had been made in one of the entries. — *Commercial Bank v. Rhind*, 3 M'Q. 645 (1860); *Rev.* 19 D. 519.

9. A letter of credit procured by A. in Glasgow, directed a bank in Liverpool to honour B.'s drafts to the amount stated. The sum was paid on presentation of the letter, and of a forged draft of B. Held that the Liverpool bank was bound to have ascertained the correctness of B.'s draft, and as it refused to honour B.'s genuine draft, the bank in Glasgow was liable to him, but would be entitled to recover from the bank in Liverpool. Held also that A. was properly joined with B. in the action against the Glasgow bank. — *Orr v. Union Bank*, 1 M'Q. 513 (1854); *Rev.* 14 D. 395.

10. A bank is not discharged by payment on a forged endorsement of a letter of credit, there being no carelessness on the part of the creditor. — *British Linen Co. v. Caledonian Insurance Co.*, 4 M'Q. 107 (1861); *Aff.* 21 D. 1197.

See BANKRUPTCY, 7, 9—FRAUD, 6—LIFERENTER, 6—PARTNERSHIP, 40.

BANK-AGENT—See CAUTIONER, 6, 20, 25, 29, 31.

BANKRUPTCY.

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I. ALIENATIONS UNDER ACTS 1621, c. 18, AND 1696, c. 5.

1. A payment in satisfaction of tocher is not reducible under the Act 1621. — *Napier v. Napier*, Cr. & St. 1 (1726); *Aff.*

2. A disposition granted to a creditor during the currency of a term which the debtor had taken to produce a progress in an adjudication at the instance of a prior creditor, is invalid. — *Billers v. Duke of Norfolk*, Cr. & St. 255 (1739); *Aff.*; *Elchies v. Adjudication*, No. 21.

3. Indorsation of a bill for the creditor's farther security is reducible under 1696, and the deposit of a bill for that purpose without indorsation may be also set aside. — *Angus v. Manson*, 2 P. 336 (1774); *Aff.* M. Bankruptcy, Ap. No. 7.

4. A lease for ninety-nine years at a fair rent is not reducible by creditors

of the granter, on the ground that at the date of granting a ranking and sale was in dependence, it being afterwards dismissed for informality, and that the granter had executed a trust-deed of security over his estate in favour of creditors, on which adjudication had followed; but a lease renewed secretly before expiry, and subsequent to the trust-deed, for an inadequate rent, and on payment of a grassum, is reducible. — *Threipland v. Walsh*, 2 P. 496 (1779); *Rev. M.* 8383; *Fordyce v. Trs. of York Buildings Co.*, 2 P. 500 (1779); *Aff. M.* 8380.

5. A heritable security by one to his brother, when insolvent, in respect of personal debts he already owed, but on which the brother did not take infestment till after the debtor's death, he not having been rendered notour bankrupt, is not reducible under the Acts. — *Macpherson v. Hannay*, 4 P. 475 (1803); *Aff.*

6. Remit to consider whether a sum paid within sixty days of bankruptcy to one not a creditor, except in virtue of a bill not yet due, is not reducible under the Act 1696. — *Spier v. Dunlop*, 2 W. & S. 253 (1826); *Rem.* 4 S. 92.

7. A bill discounted with a bank by the drawer having been dishonoured, and the drawer having, within sixty days of bankruptcy, granted an heritable security to his son for the amount, and the son having thereupon accepted a bill drawn on him by the father, who endorsed it to the bank, held that both the heritable security and the indorsation of the second bill were reducible under the Act 1696, c. 5; but that the bank, not being cognisant of the granting of the heritable security, was entitled to sue the acceptor of the second bill, and not obliged to assign it to the trustee on the father's estate. — *Low v. Bell, and Low v. Duncan*, 2 W. & S. 579 and 583 (1827); *Alt.* 2 S. 77.

8. A disposition and assignation made within sixty days of bankruptcy, in implement of missive letters granted for onerous consideration before the sixty days, is not reducible. — Remarks on *Spier v. Dunlop*, No. 6; *Cranstoun v. Bontine*, 6 W. & S. 79 (1832); *Aff.* 8 S. 425.

9. Bills being, within sixty days of bankruptcy, endorsed by the debtor to, and discounted by, his ordinary bankers, who were not aware of his insolvency, and applied by them to the payment of two instalments on a bond, one past due and the other not yet due, held that the ordinary banking business and discounting of bills does not fall under the Act, but the bankers are liable to account for their intromissions therewith; that the cheque by which the application to the payment of the instalment was made was reducible, and remit made to a jury to determine whether the bills endorsed to and discounted by the bank were deposited with them in the fair course of business, or with the view of affording the bank an unfair preference. — *Pattison v. Allan*, 7 W. & S. 26 (1833); *Rev.* 7 S. 124.

10. Trustees for creditors having consented to the delivery of goods belonging to the truster from a warehouse in which they had been deposited some months before for a merchant, on his finding caution to account for the free proceeds, they are not entitled afterwards to object that the goods actually delivered were not those previously warehoused, but were sent direct from the bankrupt's stock at a later date, so as to constitute an illegal preference; and the cautioners are not liable for the total proceeds, but only for the net proceeds.—*Douglas v. Brunton*, 7 W. & S. 489 (1834); *Aff.* 11 S. 373. *

11. An heritable security was granted over lands under their ordinary name, but after the granter's sequestration it was discovered that the description in the bond applied strictly only to a portion $\frac{1}{20}$ th in extent of what was intended, and the bankrupt then gave a corroborative security over the whole; held that this was reducible by the trustee, both as being a preference under the Act 1696, and as proceeding *a non habente potestatem*, the bankrupt being divested by the sequestration after appointment of the trustee.—*Mansfield v. Cairns*, M. Bankrupt, Ap. No. 6, and *Houston v. Stewart*, M. 1170, overruled; *Inglis v. Mansfield*, 1 S. & M'L. 203; 3 Cl. & Fin. 362 (1835); *Aff.* 11 S. 813.

12. Consignation by a debtor in a bank, not under judicial order, but on a receipt to be lodged in a depending process of multiplepinding, and expressed to be under direction of the Court, gives, on the debtor's bankruptcy, a preference in the sum consigned to the party found entitled in the multiplepinding, and excludes the trustee in the sequestration.—*Brock v. Macallum*, M'L. & R. 617 (1839); *Aff.* 1 D. 1.

See ACQUIESCENCE, 1—CROWN, 6—FORFEITURE, 11—HUSBAND AND WIFE, 59, 65, 76—REDUCTION, 11—SECURITY, 5, 6.

II. GOODS DELIVERED TO BANKRUPT.

13. Goods fraudulently purchased by an absconding bankrupt may, on discovery of his fraud, be recovered by the vendor after delivery, in a competition with the bankrupt's other creditors.—*Campbell v. Shepherd*, 2 P. 399 (1776); *Aff. M. Fraud, App. No. 3.*

14. There is no rule that fraud is presumed in the case of goods delivered to a bankrupt within three days of bankruptcy; and to establish fraud it is necessary to prove that there was an intention to stop payment at the time the contract was made; but stoppage of goods *in transitu* recognised.—*Jeffrey v. Allan*, 3 P. 191 (1790); *Rev. M.* 4949.

See PRINCIPAL AND AGENT, 11—SALE, 9, 20.

III. CONSTITUTION OF NOTOUR BANKRUPTCY.

15. Apprehension by a messenger under a caption and detention for a night, but without actual incarceration, is sufficient imprisonment

to support notour bankruptcy. — *Turnbull v. Scott*, Cr. & St. 614 (1756); *Rev.*

16. A party having retired to the sanctuary subsequent to the issue of letters of horning, but before denunciation, and being apprehended in the sanctuary, but liberated on pleading his privilege, he was held validly made a notour bankrupt. — *Baillie v. Grant*, 6 W. & S. 40 (1832); Aff. 8 S. 778.

17. When in the will of letters of caption the debtor's name is written on an erasure, though correctly appearing in the narrative and execution, it is insufficient to constitute bankruptcy. — *Duncan v. Houston*, 7 W. & S. 519 (1834); Aff. 11 S. 383.

IV. CESSIO BONORUM.

18. In opposing a cessio, the burden of proof of fraud lies on the creditors opposing; if the objections are not proved the applicant is entitled to cessio,—gross inattention is a good objection. — *M'Lean v. Bethune*, 4 P. 540 (1803); *Rev.*

19. Withholding books or papers, concealment of the affairs, and misapplication of effects under a prior arrangement with creditors, raise a presumption of fraud on the part of an applicant for cessio, such as is sufficient to justify its refusal. — *Wight v. Ritchie*, 2 Dow 377 (1814); Aff.

20. Extravagance in contracting debts is not a ground for refusing cessio after a year's imprisonment. The pursuer must revoke all deeds framed by himself in favour of his wife, excluding the *jus mariti*. — *Pentland v. Glass*, 1 W. & S. 65 (1825); Aff.

21. A parish minister with a stipend of L.150 and L.1400 of other property, partly liferented, is bound to assign L.75 to his creditors in obtaining a cessio. — *Scott v. Macdonald*, 1 S. Ap. 363 (1823); Aff. F. C., 11 March 1818.

22. In a cessio bonorum, the Court of Session directed that part of the debtor's salary as collector of customs should be assigned to the creditors, the House affirmed, on the ground of a series of decisions in the Court below, though with a declaration that the case should not preclude reconsideration on the ground that a salary not attachable could not be made assignable in part. — *Hunter v. Gardner*, 5 W. & S. 616 (1831); Aff. 9 S. 562.

V. SEQUESTRATION.

1. Award.

23. After a silence of twenty years it is incompetent for creditors in the sequestrated estate of a firm to insist that the estate of an individual partner was also included in the sequestration. — *Henderson v. Glynn*, 6 P. 207 (1816); Alt.

24. An oath to the debt, under the 54 Geo. III. c. 137, might competently be made before a Justice of the Peace in Ireland, and prior to the diligence on which bankruptcy was founded. — *Taylor v. Little*, 1 S. Ap. 254 (1822); *Aff.*

25. A bill drawn on a wrong stamp, produced as a voucher, does not invalidate the petitioning creditor's oath to the verity of his debt, and the consequent award of sequestration. — *Geddes v. Mowat*, 2 S. Ap. 230 (1824); *Aff.* See 29.

26. A sequestration of a domiciled Scotsman who has gone to England will not be recalled, on the ground of a commission of bankruptcy being subsequently issued in England founded on an act of bankruptcy in England prior to the date of sequestration. — *Geddes v. Mowat*, 2 S. Ap. 230 (1824); *Aff.*

27. A heritable creditor, obtaining payment by special agreement with the ordinary creditors in a sequestration, is not liable for the expenses of the sequestration. — *Goodwin v. Brown*, F. C., 1 Feb. 1815, doubted. *Gardner v. Cuthbertson*, 2 S. Ap. 291 (1824)ⁿ; *Rev.*

28. The law-agent employed, under 34 Geo. III. c. 137, to obtain a sequestration, had no claim for his expenses against the general creditors as individuals. — *Guthrie v. Curl*, 1 W & S. 191 (1825); *Aff.*

29. The debt of the petitioning creditor may be made up to the statutory amount by assignation of several debts, though assigned subsequent to the bankruptcy, and for a consideration which would not make up the statutory amount; and it is no objection to the sequestration that one of such assignations had been insufficiently stamped, and the fact had escaped notice of the Court. — *Robb v. Forrest*, 5 W. & S. 740 (1831); *Aff.* 8 S. 1035.

30. Under the old bankrupt law sequestration might be applied for after the bankrupt had ceased to be a trader, and on a debt incurred before he became a trader. The English judges called in to consider the question framed as if it occurred in England. — *Baillie v. Grant*, 6 W. & S. 40; 6 *Bligh*, N. S. 459; 1 *Cl. & Fin.* 238 (1832); *Aff.* 8 S. 778.

31. The official manager appointed under the Winding-up Acts is not entitled to apply, after the death of a shareholder, for sequestration of his estate in consequence of non-payment of calls. Question, Whether the 2 & 3 Vict. c. 41 was repealed as to existing application by the 19 & 20 Vict. c. 79. Costs as against the bankrupt estate reserved. — *Wryghte v. Lindsay*, 3 M^cQ. 772 (1860); *Aff.* 19 D. 55.

See PARTNERSHIP, 20.

2. Oath of Creditor.

32. The trustee on a sequestrated estate, and not the bankrupt, is the proper party to make the oath (which may be of credulity) in

claiming on another sequestrated estate. — *Ferrier v. Berry*, 2 W. & S. 93 (1826); Aff.

33. An oath is valid without signature of the party or notaries if the deposition bears that he cannot write. An oath by a wife, with concurrence of her curator *ad litem* appointed in an action of count and reckoning against the bankrupt, is sufficient when her husband is a convict. An oath is not invalidated by referring as authority for the amount to the statements made in such action, nor by containing a reservation of right to augment or restrict the claim. — *Paul v. Gibson*, 7 W. & S. 462 (1834); Aff. 12 S. 431. See also 24.

3. Procedure in Sequestration.

34. Reduction refused of an agreement entered into thirty-seven years before by the creditors and trustee on a sequestrated estate of a company, whereby, on condition of certain arrestments on the estate of a partner being loosed, the creditors assented to the assignment to the arresters of a portion of the funds of the partner and the company, though the arrangement was alleged to have proved a losing one for the creditor. — *Henderson v. Selkirk*, 6 P. 198 (1816); Aff.

35. A majority of creditors, at a meeting duly called, may abandon the defence of an action instituted for the purpose of reducing one of the securities belonging to the estate. Query, Whether the minority are entitled to demand an assignation of the security to them. — *Davidson v. Lockwood*, 2 S. Ap 362 (1824); Rev.

36. A party who had purchased from the trustee in a sequestration was found entitled to have a good title made (2 W. & S. 522), and having applied to the Court to apply the judgment, he is bound to accept the title when made good. — *Dick v. Cuthbertson*, 5 W. & S. 712 (1831); Aff. 9 S. 93.

37. Although in a sequestration the rule of the statute forbidding the raising a new plea after closing the record does not apply, the rule of competent and omitted does, and it applies also in the House of Lords on appeal, and therefore a petition for rehearing, on the ground that a certain plea had not been considered, either in the Court below or on appeal, was refused. — *Scot v. Ker*, 6 W. & S. 214 (1832).

38. Observations by Lord Brougham on the impropriety of allowing the trustee to be removed by a majority of the creditors. — *Paul v. Gibson*, 7 W. & S. 462 (1834).

39. The creditors may take a new lease of adjoining coalfields to enable them to continue the profitable working of what the bankrupt held, and neither the bankrupt nor his wife, as a contingent creditor, can object to such a course. Nor can they object to a resolution of the

creditors to compromise and discharge claims by and against the bankrupt. — *Taylor v. Kerr*, 1 S. & M'L. 94 (1835); Aff. 11 S. 250.

40. When a question respecting the management of the estate and the compromise of claims has been several times discussed at meetings of the creditors, it may be finally disposed of at a meeting called by the trustee expressly to consider another question, "and to instruct the trustee generally upon the affairs of the estate." — *Taylor v. Kerr*, 1 S. & M'L. 94 (1835); Aff. 11 S. 250.

41. An application to delay the proceedings in a sequestration pending the decision of an appeal against the sequestration is incompetent. *Taylor v. Kerr*, 1 S. Ap. 30 (1824); Aff.

42. An appeal from a trustee in a sequestration must, under the acts 6 Geo. IV. c. 120, and A. S. Nov. 1825, have been remitted to a Lord Ordinary, where there were disputed questions of fact. — *M'Taggart v. Jeffrey*, 4 W. & S. 361 (1830); Rev. 6 S. 641.

43. An objection to the title of the petitioning creditor having been repelled, and the interlocutor not appealed from, other objections to the title, not stated in the Court below, cannot be considered on an appeal from the interlocutor awarding sequestration. The awarding of sequestration cannot be stopped by an appeal against the proceedings by which the notour bankruptcy was constituted. — *Scot v. Ker*, 4 W. & S. 441 (1830); Aff. 7 S. 438.

4. *Ranking.*

44. Bills remitted to a creditor for a different purpose may be set off by him against his debt before the remitter becomes bankrupt, or commits an act of bankruptcy; and on bankruptcy occurring the creditor is not bound to return the bills to the bankrupt's trustee. — *Hewit v. Elliott*, 2 P. 381 (1775); *Rev. Bell*, 458, *note*.

45. The evidence of a partner of a bankrupt company is admissible to prove the rights of competing creditors as affected by his own acts as an individual. — *M'Dowal v. Annand*, 2 P. 387 (1776); Aff.

46. Where a second claim is made in a sequestration it is not to disturb former dividends, but will, on occasion of the next division, draw an equalizing dividend. — *Speirs v. Dunlop*, 2 P. 437 (1777); *Alt. M. Society*, Ap. No. 2.

47. In the sequestration of a company and an individual partner, the trustees of the company are entitled to rank on the partner's estate for so much as he was personally indebted to it, and after imputing the dividend thereon, and the dividend from the company's estate in extinction of the company's debts, they are entitled to rank again for that balance of the company's debts on the separate estate of the partner, assigning to him their right for the purpose of operating his relief from

the other partners *pro rata*. — *Speirs v. Dunlop*, 2 P. 437 (1777) ; *Aff. M. Society*, App. No. 2.

48. In a sequestration in Scotland of a Scottish firm, the assignees in bankruptcy of an English bank claimed to be ranked for bills drawn by the Scottish firm, and which, after passing through several hands, had been discounted by the bank, the trustee in the sequestration claimed to set off from this the amount of bills accepted by the bank and endorsed by the Scottish firm, and which were now protested, and ranked on the Scottish estate. Held that such set off was inadmissible. — *Curtis v. Chippendale*, 3 P. 540 (1797) ; *Rev. M.* 2589.

49. A tenant being a creditor of his landlord is entitled to retain and impute his rent in the first place to pay the interest, and in the second place the principal, of all such debts due to himself as are preferable to those of other creditors of the landlord. — *Campbell v. Welsh*, 3 P. 32 (1785) ; *Rev.*

50. A creditor recovering payment of his debt from the keeper of a jail who has suffered the debtor to escape, is not bound to communicate the sum to the other creditors in a sequestration. — *Young v. Muir*, 1 S. Ap. 25 (1824) ; *Rev.*

51. A creditor having, under Stat. 54 Geo. III. c. 137, ranked and drawn a dividend on the whole of his debt, though, being payable by instalment, part of it was not yet due, held that it was imputable not solely to the extinction of the instalment past due, but rateably to each instalment. — *Balmanno v. M'Nee*, 2 W. & S. 7 (1826) ; *Rev.* 3 S. 60.

52. Heritable debts infert have, on a deficiency of the real estate, no preference over the moveables on the estate in a sequestration, unless such preference has been established by pointing of the ground, but rank with other debts *pari passu*. — *Hay v. Marshall*, 2 W. & S. 71 (1826) ; *Aff.* 3 S. 223.

53. A sequestration of a son possessing on apparency within three years of his father's death is an adjudication which establishes the preference of the father's creditors. — *Bennet v. M'Lachlan*, 3 W. & S. 449 ; 4 Bligh, N. S. 529 (1829) ; *Aff.* 4 S. 712.

54. The husband of one of three heirs portioners bought the estate, and made the price a real burden on it, and on its being sold on his bankruptcy, the balance, after paying preferable debts, was not sufficient fully to meet this claim. Held that during the husband's life the interest of the share falling to his wife, as belonging to the husband *jure mariti*, must be paid to the other two sisters in satisfaction of their claim. — *Napier v. Glendonwyn*, 1 S. & M'L. 374 (1835) ; *Aff.* 11 S. 707.

55. Trustees vested in an insolvent's estate for the relief of the cautioners for a composition, having sold it, and as to part of the price

declared it a real burden, while also taking bond for it to themselves as individuals, and for other parts of the price, having only taken bonds to themselves as individuals, and one of them having become bankrupt, while the others had made large advances to the trust estate. Held that the bankrupt's share in the bond taken to the trustees as individuals passed to his personal creditors, but that the whole of the sum declared to be a real burden was to be applied to the debts of the trust estate, and to the relief of the advances made by the other trustees. — *Jeffrey v. Paul*, 1 S. & M'L. 767 (1835); Alt. 12 S. 718.

56. When creditors, real and personal, have by arrangement, and in order to prevent preferences being acquired while the debtor's affairs were being carried on under inspection, caused a postponed heritable creditor to execute a pointing of the ground, such diligence gives him no preference over the prior heritable creditors. — *Beveridge v. Smith*, M'L. & R. 806 (1839); Aff. 16 S. 381.

57. Observed that the trustee in a sequestration can only obtain a title to the heritable estate in which the bankrupt was not infeft, subject to the obligations which could have been enforced against the bankrupt. — *Edmond v. Gordon*, 3 M'Q. 116 (1858); Aff. 18 D. 47.

See ASSIGNATION, 2—CAUTIONER, 2, 3, 5, 6—GUARANTEE, 1, 2—

INHIBITION, 4—LANDLORD AND TENANT, 9.

5. Trustee.

58. Remit to consider whether the having an adverse interest to the body of the creditors is a valid objection to the trustee or commissioners, or to the vote of a creditor for either, or forms a valid ground for removal of either after being confirmed. — *Campbell v. Mc'Nair*, 5 P. 48 (1805); Rem. F. C. 1 Feb. 1809.

59. Remit to consider whether the trustee and commissioners in a sequestration are not liable personally in damages to the bankrupt, after its recall, for wilful mismanagement of a coal mine, part of his estate, by which its value was deteriorated. Opinion of Lord Eldon that they are liable. — *Wilson v. Alexander*, 5 P. 182 (1807); Rev. M. 13968.

60. A trustee in a sequestration is personally liable on all contracts relating to the estate entered into by himself. — *Jeffrey v. Brown*, 2 S. Ap. 349 (1824); Aff. 1 S. 102.

61. A trustee having in the scheme of division allotted no dividend to a claim against which he marked the words "holds goods," and the claim not being pressed, and all the funds divided, and the creditor having sold the goods, and then claimed for the balance still due he has no personal claim against the trustee. — *Jeffrey v. Ure*, 1 W. & S. 565 (1825); Rev. 2 S. 646.

62. In special circumstances, a failure in regularity by the trustee

held not to warrant his removal, and expenses given to the trustee. — *Ewing v. Lawrie*, 2 W & S. 19 (1826) Aff. 3 S. 234. *See* 38.

63. The trustee in a sequestration having bound himself by articles of roup to execute and deliver a valid disposition of the subjects, is bound to make a good title to the estate; and a disposition by the bankrupt's wife to the trustee, not ratified by her husband, is not a good title. — *Dick v. Donald*, 2 W. & S. 522; 1 Bligh, N. S. 655 (1826); *Rev.*

64. A trustee taking benefit for some years of feus and leases belonging to the bankrupt becomes liable for all prestations becoming due under them, and cannot renounce them, and a decree-arbitral, discharging the trustee and the landlord of all claims mutually alleged in respect of past arrears, does not relieve the trustee from future liability. — *Gibson v. Kirkland*, 6 W. & S. 340 (1833); Aff. 9 S. 596.

65. The cautioner for a trustee in a sequestration is not discharged from liability for the trustee's defalcations by alleged neglect on the part of the commissioners to perform their statutory duties in superintending him. — *M'Taggart v. Watson*, 1 S. & M'L. 553; 3 Cl. & Fin. 526 (1835); *Rev.* 12 S. 332.

66. The Sheriff has power to award costs against a creditor competing for the office of trustee at and after the meeting for election, and any error in giving such costs is matter for appeal only, not for action of reduction. — *Baillie v. M'Gibbon*, 6 S. Bell, 260 (1848); Aff. 8 D. 10.

6. Composition and Discharge.

67. A bankrupt who has been examined may be discharged, though he has subsequently gone or remains abroad. Executors and trustees may concur in the discharge (and be computed) though not producing their titles as such. A debtor is not bound to prove that his bankruptcy arose from innocent misfortunes to entitle him to discharge. Opinion by Lord Eldon that no appeal should lie on such questions. — *Marshall v. Stair*, 4 P. 480; 6 P. 809 (1803); Aff. — *M'Lean v. Bethune*, 4 P. 540 (1803); *Rev.* *See* 18, 19.

68. It is competent for creditors by a majority to withdraw a sequestration on the terms of accepting a composition offered before it was granted, and payment in full of all debts incurred subsequent to the offer, and the cautioners for such composition are bound to relieve the trustee accordingly. — *Arrot v. Ker*, 4 P. 648 (1804); Aff.

69. Funds belonging to a bankrupt remain his after execution of a composition contract, and parties joining in such contract cannot afterwards claim out of such funds payment of accommodation bills retired by them prior to the execution of the contract. — *Orr v. Hance*, 1 W. & S. 227 (1825); *Rev.*

70. A creditor whose claim has been rejected, cannot oppose acceptance of a composition, but may sue for his share in it. — *Ferrier v. Berry*, 2 W. & S. 93 (1826); Aff.

71. Under the 54 Geo. III. c. 137, the concurrence of creditors might be validly computed, although they had not been previously ranked. — *Ewing v. Gilchrist*, 2 W. & S. 22 (1826); Aff. 2 S. 778.

72. If the majority of creditors accept a composition on evidently bad terms, the House will refuse to approve it, but if they accept a composition which is perhaps less than could be attained by litigation, but the result of the litigation is uncertain, the composition will be approved. — *Robertson v. Alexander*, 5 W. & S.; 2 Dow & Clark, 312, 1 (1831); Aff. 8 S. 1055. See Appeal, 109.

73. A creditor of an undischarged bankrupt may, after twenty years, bring an action against him for the debt, the sequestration interrupting prescription; and the claim ranked by the trustee, and computed by the bankrupt in an application for confirmation of composition, is presumed a correct statement of the debt, without production of vouchers for the items. — *Cunningham v. Dods' Trs.*, 2 S. & M'L. 984 (1837); Aff. 12 S. 678.

74. A bankrupt having settled with his creditors by a composition, which the cautioner paid, and having subsequently purchased up the rights of his creditors thereto, held not justified in certain objections to the state of an accountant, who found that the cautioner had made advances in payment of the composition greatly exceeding the assets. — *Barry v. Waddell*, M'L. & R. 759 (1839); Aff.

7. *Bankrupt's Title to Sue.*

75. A tenant in a lease secluding assignees, allowed to sue on the lease after bankruptcy and abandonment of claim by the trustee, on giving security for expenses. — *Taylor v. Fairlie*, 2 W. & S. 101 (1826); Aff. 4 S. 450.

76. In an action of declarator of irritancy of a lease brought against a sequestrated bankrupt and his trustees, on the latter declining to defend, the bankrupt is entitled to defend without finding caution for expenses. — *Taylor v. Fairlie*, 6 W. & S. 301; 1 Cl. & Fin. 355 (1833); Rev. 8 S. 666.

BELLIGERENT.

1. A foreign privateer having ransomed a captured British vessel, and being afterwards herself captured by a British ship of war, the owners of the captured vessel are entitled to return of the money paid as ransom, as well as of goods which the privateer had taken out of her. — *Collier v. Stewart, Robert*. 130 (1715); Aff. M. 11940.

2. A neutral ship, taking in cargo at a port of a belligerent, but not in any way adopted as a belligerent ship, and the cargo being purchased and paid for by the master, is not liable to seizure by the other belligerent. — *Hendricks v. Cunningham*, 2 P. 609 (1783); *Rev. M.* 11959.

3. If a privateer captures a neutral vessel with neutral goods, and fails to bring her in forthwith for adjudication, he is liable for demurrage and damages for detention, although misled by the master of the captured vessel declaring on capture that the cargo was good prize, but the vessel not so. — *Falkjeff v. Elphinstone*, 3 P. 356; 5 Br. P. C. 343 (1784 and 1794); *Aff.*

4. The courts of this country accept as conclusive the condemnation of a vessel pronounced by the court of a belligerent, looking into it only so far as to see that the condemnation is stated as on the ground of enemy's property. Query, What would be the effect of condemnation proceeding on a special ordinance peculiar to the country in which the condemnation took place. Opinions of English Judges. — *Lothian v. Henderson*, 4 P. 484 (1803); *Aff. M. Insurance*, Ap. No. 4.

5. Principle on which trade with an enemy is stopped, and allowed under royal license. (Per Lord Wynford.) — *M'Gavin v. Stewart*, 4 W. & S. 184 (1830).

See INSURANCE, MARINE.

BILL OF EXCHANGE.

I. FORM & QUALITIES, . p. 65 | II. NEGOTIATION & RECOURSE, . p. 66

I. FORM AND QUALITIES.

1. A bill granted in place of one alleged to be bad in form and retired, is for valuable consideration. The consideration of the first bill was an alleged promise of marriage, the effect of which was not dealt with in the judgment. — *Calder v. Provan*, Cr. & St. 359 (1744); *Aff. M.* 9511.

2. Documents in the form of bills of exchange, but not really of a commercial nature, are not prescribed by the lapse of less than forty years, and will carry interest, if stipulated on their face. But in this case the acceptor was law-agent of the drawer. — *Garden v. Rigg*, Cr. & St. 409 (1748); *Alt. M.* 10450, 11274.

3. Terms of correspondence held insufficient to prove that bills were granted by the party as agent and not as principal, nor for a limited and concluded purpose. — *Lawson v. Tait*, 2 P. 505 (1779); *Aff.*

4. Prescription begins to run only on the expiry of the last day of grace. — *Ferguson v. Douglas*, 3 P. 503; 6 Br. P. C. 276 (1796); *Aff.*

5. A renewal bill being sued on, but appearing to be vitiated, decree cannot be given for the sums contained in the original bill, but the

action may be dismissed, reserving right to bring a new one on the original bill. — *Lee v. Murdoch*, 4 P. 261 (1801); *Rev.* See 19.

6. A bill being acknowledged by relative letter to be for the drawer's accommodation, it is competent for him to prove that the money was really disbursed by him for the acceptor's behoof, with his knowledge, and such evidence is a good defence to an action at the instance of the acceptor against the drawer. — *Earl of Wemyss v. Carre*, 5 P. 219 (1808); *Aff.*

7. An indorsation per procuration does not require a special mandate, but may be authorised by a general course of dealing. — *Davidson v. Robertson*, 3 Dow, 218 (1815); *Rev.*

8. An indorsement back to a prior indorser, without recourse on the intermediate indorsers, is for value. — *Davidson v. Robertson*, 3 Dow 218 (1815); *Rev.*

9. The reference to oath of the drawer as to whether value had been given for a bill is a matter of discretion in the Court. — *Ritchie v. Mackey*, 3 W. & S. 484; 4 Bligh, N. S. 535 (1829); *Aff.* 41 S. 534.

10. Held on the evidence that bills in the hands of the debtor in them were not paid, but renewals of other bills retired. — *Brown v. Paterson's Trs.* 4 W. & S. 57 (1830); *Aff.* 5 S. 204.

11. A promissory note on which an erroneous protest and diligence have been taken, though it has lost the privileges of summary execution, still stands a good document of debt — *Wilson v. Maclellan*, 4 W. & S. 398 (1830); *Rev.* 7 S. 401.

12. In an action of constitution of bills and notes found in the repositories of a law-agent, and granted by a client, there being produced letters from the client, acknowledging, in general terms, his large indebtedness to the agent, diligence will not be granted to the defender to recover the agent's books and documents, in order to prove his intromissions. — *Earl of Strathmore, v. Ewing*, 6 W. & S. 56 (1832); *Aff.* 4 S. 310.

13. A bill being written on a 4s. 6d. instead of a 5s. stamp is null, as well as a proof of debt as an obligation, and the defender cannot be barred, either by delay or personal exception, from pleading the defect. — *Robertson v. Ettles*, 7 W. & S. 176 (1834); *Rev.* 11 S. 397. See Bankruptcy, 25.

14. The indorser of an accommodation bill, endorsed after the execution of a trust-deed by the indorser, is not presumed to be an onerous holder, and is not entitled to have the question of onerosity referred to his oath. — *Hunter v. George*, 7 W. & S. 333 (1834); *Aff.* 10 S. 604.

See BANKRUPTCY, 3, 6, 7, 9—GUARANTEE, 2, 5—HUSBAND AND WIFE, 29—MINOR, 6—PARTNERSHIP, 44, 46, 65—PRINCIPAL AND AGENT, 9, 11, 18.

II. NEGOTIATION AND RECOURSE.

15. Notice of payment *supra protest* for honour preserves recourse at least as to bills paid within eight days prior, and bills paid subsequently, to the notice. — *Ochterloney v. Hunter, Cr. & St.* 396 (1745); *Rev. M.* 1567.

16. A bill of exchange being transmitted by a Collector of customs to the Receiver-General, to lie as a deposit with him until the amount due by the Collector could be ascertained, and the Receiver having acknowledged that he held it for that purpose, but on its becoming due, having taken no steps to recover the amount, he is liable for the amount to the Collector. — *Grosset v. Murray, 2 P.* 81 (1763); *Rev.*

17. Bills transmitted by A. to B. in course of business, with instructions to place the proceeds to the sender's account, being sent by B. to C. for recovery, who transmitted the amount to B., but desired it to be placed to his credit, and soon after became bankrupt, being in debt to B. Held that A. was entitled to credit from B. for the amount of the bills from the date at which the proceeds were received from C. — *Brebner v. Haliburton, 6 P.* 753 (1763); *Rev.*

18. Recourse on the drawer of a protested bill is not lost when, on his not being found at his usual address, but afterwards is found to have gone into the country, the course which might reasonably be expected to be the most expeditious for giving him notice is adopted. The taking part payment from the acceptor after protestation does not liberate the indorser. — *Hodgson v. Bushby, 2 P.* 607 (1783); *Rev. M.* 1610.

19. A bill being protested, and a fresh bill for the amount granted in security of it, which, on falling due, was dishonoured, but not duly protested, the original bill is by such neglect extinguished. — *Reid v. Coats, 3 P.* 326; 6 *Br. P. C.* 264 (1794); *Rev. M.* 1620. *See* 5.

20. Drawing a dividend on the estate of the drawer of a protested bill does not liberate the acceptor. — *Ferguson v. Douglas, 3 P.* 503 (1796); *Aff.*

21. A bill being paid, after dishonour, by an agent for the acceptor, and out of the acceptor's funds, the agent afterwards ranking on the acceptor's estate for the amount, the agent has no recourse on the drawer. — *Ross v. M'Dowall, 4 P.* 12 (1798); *Rev.*

22. A party who had accepted a bill, drawn and indorsed by one who afterwards became bankrupt, but accepted it as payable only on delivery of goods to him by the bankrupt, is not liable on the assignees in the bankruptcy preventing the delivery, nor bound to proceed in an action against them, but he is liable for half the costs in an action against them by the indorser up to the period at which he withdraws from the action. — *Craig v. Howie, 6 P.* 261 (1817); *Rev.*

23. A bill being dishonoured, and duly protested, and another party having accepted a bill at six months in security for the amount, on receiving assignation to the original bill, he is entitled, on paying the second bill out of his own funds, and placing the amount to the debit of the acceptor of the first bill in account with him, to proceed with diligence against the drawer of the first bill. — *Leslie v. Shepherd*, 7 W. & S. 457 (1834); *Aff.* 11 S. 436.

24. A consignee accepting a bill drawn on him by the consignors for the value of the goods is not entitled, before the value is realised, to the privileges of the acceptor of an accommodation bill, but he is entitled to reimbursement from the consignor on taking the accounts, if it is beyond the sums received. — *Gibson v. Rutherglen*, 1 S. Bell, 519 (1842); *Aff.* 3 D. 806.

25. The addition to a bill before protest of the addresses of the indorsers, even though incorrect, which are copied in the protest, will not invalidate summary diligence following, or bar recourse on the drawer or indorser. — *Russell v. Creighton*, 2 S.; Bell, 81 (1843); *Aff.* 1 D. 923.

See DEBT, 4.

COMPENSATION ON BILLS — *See* BANKRUPTCY, 44, 48.

BONA FIDE POSSESSION.

1. A *bonâ fide* possessor, though not liable for debts on the title of behaviour as heir, is bound to keep down the current interest on them. The rents *percepti et consumpti* will not be imputed in satisfaction if a bond of provision due out of the estate to the *bonâ fide* possessor. — *Maitland v. Gordon*, 2 P. 43 (1760); *Aff.* M. 11161.

2. An executrix, under a will afterwards reduced, was charged with interest at 5 per cent. on all capital sums from the date of receipt, and on rents, &c., from a twelvemonth after receipt. — *Lawson v. Maxwell*, 4 P. 464 (1803); *Aff.*

3. A tenant of a tailzied farm having paid a grassum at a time when such arrangements were believed legal, the tenant was not liable for violent profits prior to the first term after the date of the judgment of the House of Lords declaring them illegal, and reducing the lease. The personal representatives of the heir of tailzie who received the grassums are not liable in damages to the succeeding heir of tailzie (but reserving any claim for the amount of the grassums), but are liable to the evicted tenants under a clause of warrandice in the lease, and such tenants are not barred from claiming against the representatives in Scotland by the fact of having also made a claim in Chancery against the English executors. — *Duke of Buccleuch v. Hyslop and four other cases* (Queensberry

Cases); 2 S. Ap. 43 to 96 (1824); Aff. 2 S. 6; *Elliot v. Pott*, 2 S. Ap. 181 (1824); Aff.

4. The holder of a lease of an entailed estate, reducible for length, is liable for violent profits from the time of the decision of the Court of Session reducing it, and not merely from the time of a subsequent decision of the House of Lords settling finally the law, and he has no claim for prior outlay in meliorations. (Per Lord Wynford)—Though the law might have been doubtful, a party obviously trying to take advantage of the doubt is in *mala fide* from the service of process. — *Innes v. Exs. of Duke of Gordon*, 4 W. & S. 305 (1830); Aff. 6 S. 279.

5. The plea protects a possessor holding under a title affirmed by the Court of Session until reversed by the House of Lords. — *Carnegy v. Scott*, 4 W. & S. 431; 7 Bligh, N. S. 462 (1830); Aff. 6 S. 206.

6. A party holding a commission to a public office, which is, on inspection, evidently vitiated, is liable to refund the profits from the date of citation in an action to reduce the commission less the expenses incurred in executing the office. Observed that *bonâ fides* is always a question of circumstances in each particular case. — *Walker v. Craig*, 7 W. & S. 82 (1833); Aff. 5 S. 843, and 9 S. 587.

7. When, during a litigation, the party in possession is ordered to keep an account of the profits, he has no claim, on the question being decided against him, to retain the interim profits. And such a question being one of law only, is not proper to be sent to a jury. — *Mags. of Dingwall, v. Munro*, M'L. & R. 772 (1839); Aff.

See ADJUDICATION, 4—ENTAIL, 151, 172, 173—LIFERENTER, 3.

BONA FIDE PAYMENT—See ARRESTMENT, 4—FORFEITURE, 1.

BOND.

See also CAUTIONER—CONTRACT—DEBT—DEED—INTEREST—SECURITY.

1. A bond reciting that the grantee intended to sue certain parties for relief, provided that, in event of his succeeding, the bond should be void, the grantee afterwards compromised his claim. Held that he was bound to relieve the granter of the bond in proportion to the amount he recovered. — *Paterson v. Cockburn, Robert*. 503 (1725); Aff.

2. A bond for the purchase-money of a commission in the army reduced on proof that the seller had been, soon after the date of the bond, dismissed the service, and his commission given to another officer without purchase, and that the granter of the bond, though he received on its execution the demission of the seller, and obtained subsequently a commission in the same regiment, had done so by purchase from another officer. — *Cochrane v. Lord Blantyre, Robert*. 558 (1726); Aff.

3. In a condition in a bond, that if the grantee failed to fulfil the consideration by a fixed day, the bond should be void, the time is of the essence of the contract, and the condition is not a penal irritancy capable of being purged after lapse of the day, nor does a payment by the grantor after the lapse of the day waive the conditions. — *Stirling v. Gray, Robert*. 590 (1727) ; *Aff. M.* 7273.

4. Damages and expenses may be given for non-payment of interest on a bond, though the bond contains a penalty only for failure to pay the principal, and not for failure to pay interest, and the damages may be sued for after payment of the interest in arrear has been accepted. — *M'Culloch v. M'Culloch, Robert*. 611 (1727) ; *Aff.*

5. An acknowledgment in letters of the justness of a debt on bond, excludes evidence of part of it having been on account of accommodation bills. — *Johnstone v. Middleton*, 5 P. 653 (1812) ; *Aff.*

6. A bond of relief was challenged on the ground of fraudulent misrepresentation in obtaining it ; it was admitted that it had not been "elicited by personal influence." Held irreducible. — *Webster v. Christie*, 5 P. 705 ; 1 Dow, 247 (1813) ; *Aff.*

7. The narrative in a bond does not instruct the onerous cause, but proof thereof allowed in a reduction of them on the ground of want of consideration. — *Murray v. Charteris*, 6 P. 668 (1734) ; *Rev.*

8. A cash credit bond expressed to be for "L.5000, and three years' interest thereon at the rate of 5 per cent.," is equally valid as if it had specified L.5750 as the whole sum secured. — *Morton v. Hunters*, 4 W. & S. 379 (1830) ; *Aff.* 7 S. 172.

9. The party impeaching a bond as having been granted for a gaming debt, is bound to prove that such was the consideration. — *Sutton v. Ainslie*, 1 M'Q. 299 ; 1 Stu. 702 (1852) ; *Aff.* 14 D. 184.

See ADJUDICATION, 1, 2—ASSIGNATION, 2, 5—COUNSEL, 1, 2—GUARANTEE, 7—PRESCRIPTION, 18, 20—PROVISION—REDUCTION.

BURGAGE TENURE.

1. Remit to the whole Court of Session to consider questions of title and fact as to the subjects of burgage symbols, thirlage, and burgh dues. — *Mags. of Glasgow v. Dawsons*, 2 W. & S. 230 (1826) ; 3 S. 136.

2. Lands within burgh held by the corporation in burgage, may be granted by them to be held in burgage, and a tenendas "to be holden in free burgage for service of burgh used and wont," is sufficient to establish that such is the tenure, though the tenant is not expressly declared to hold of the Crown, and the title in some other respects is allowed to be made up in the manner appropriate to feu holdings. In

burgage tenure the town-clerk has the exclusive privilege of preparing sasines, and they must be recorded in the burgh register. — Dawson v. Mags. of Glasgow, 4 W. & S. 81 (1830); Aff. 6 S. 19.

See HUSBAND AND WIFE, 68.

BURGH.

I. CONSTITUTION & RIGHTS, . . .	p. 71	III. LIABILITY OF MAGIS-	
II. ELECTION OF MAGISTRATES, . . .	73	TRATES,	p. 75
See also CORPORATION.			

I. CONSTITUTION AND RIGHTS.

1. Held that the magistrates of Edinburgh could not pass a by-law forbidding the sale of tallow except to the candlemakers of the town, and that the Acts 1424, c. 32, and 1540, c. 123, did not form an existing restraint against the vending of tallow for sale. — Corporation of Butchers v. Mags. of Edinburgh, Robert. 124 (1715); Rev. 1715.

2. A charter to a superior erecting his lands and a town within them into a burgh of barony, incorporates the burgesses and the several crafts as established by usage; but it leaves the government thereof, and the levying of the customs granted in the charter, in the hands of the superior, and the burgesses cannot gain by immemorial usage a servitude of drying and bleaching clothes and skins on part of the superior's lands. — Duke of Roxburgh v. Jeffrey (Kelso), Cr. & St. 632 (1757); Rev. M. 2340.

3. A burgh schoolmaster appointed by the magistrates and town-council may be removed by them on just and reasonable cause, and cruel punishments habitually inflicted on the pupils, and engaging in other avocations, form such cause. — Campbell v. Hastie, 2 P. 277 (1772); Rev. M. 13132.

4. Remit to consider whether the Corporation of Edinburgh, which had right to tolls upon all cattle sold at a certain market, could, on the disuse of the market, impose tolls upon cattle sold privately and brought within the city. — *Fleshers v. Mags. of Edinburgh*, 4 P. 375 (1802); Rem. M. Royal Burgh, Ap. No. 6.

5. The sons and sons-in-law of traders having right to be admitted at lower fees into trade incorporations, and members of trade incorporations having right to be admitted at low fees into the guildry of merchants; held that the sons and sons-in-law of traders have not right to claim entry at low fees into the guildry. — *Trades of Perth v. Proudfoot*, 4 P. 544 (1803); Aff.

6. Freemen or burgesses are only admissible by a majority of the

whole town-council present at a legal meeting. — *Martin v. Macnab* (Queensferry), 5 P. 125 (1806); Aff. F. C. 26th Dec. 1803.

7. Remit as to the power under the charters or by usage of the Corporation of Aberdeen, to impose upon rough fat sold privately the burgh duties on tallow sold in market. — *Still v. Mags. of Aberdeen*, 5 P. 313 (1810); Rem.

8. A mason, not being a freeman, might lawfully build a house on his own property within burgh. — *Wrights of Portsburgh v. Lorimer*, 6 P. 233 (1816); Aff.

9. It is not necessary that persons exercising trades in the New Town of Edinburgh should be burgesses. — *Sprott v. Scott*, 4 Dow, 290 (1816); Aff. F. C. 6th Dec. 1810.

10. The bailies of a burgh of barony may, by consuetude for 100 years, acquire jurisdiction over the inhabitants of a burgh of regality, locally included in the burgh of barony. — *Dowie v. Douglas*, 1 S. Ap. 125 (1822); Aff. F. C. 30th May 1817.

11. The Dean of Guild may, under the statute 57 Geo. III., c. 53, authorise proprietors of shops to bring forward the fronts of their houses to the pillars of the piazzas before them. — *Gordon v. Bogle*, 1 S. Ap. 452, 4th June 1823; Rev.

12. A tax being imposed by charter on the sellers and all other importers of wine, and the statute 25 Geo. III. c. 28, having abolished the impost as regarded all private families, and granted in place thereof a tax on all the inhabitants; held that vintners selling wine were liable for the impost, whether it was imported by them or not, but that they were not liable for the statutory tax in addition — *Budge v. Mags. of Edinburgh*, 2 W. & S. 588 (1827); Aff. 4 S. 522.

13. The town-clerk of a burgh of barony, appointed by the superior of the burgh, is not by law the agent of the superior in preparing charters, and therefore, on an appointment of town-clerk with the fees and emoluments formerly enjoyed, a remit made to ascertain the prior particular usage. — *Cunningham v. Veitch*, 3 W. & S. 491 (1829); Rem. 4 S. 579.

14. A town-clerk appointed for five years is entitled to a possessory judgment in an attempt to remove him after the five years, reserving to the magistrates to raise a declarator of their right to remove him. — *Mags. of Annan v. Farish*, 2 S. & M'L. 930; Aff. 14 S. 111.

15. Neither ratepayers nor individual commissioners of police, suing not as a minority, but as ratepayers, have any title to sue the Commissioners of Police in respect of alleged misappropriation of rates. — *Ewing (& Morrison) v. Glasgow Police Comrs.*, M'L. & R. 847 and 868 (1839); Aff. 15 S. 1128.

16. The magistrates of a burgh, being justices, have jurisdiction under the Small Debt Act, 6 Geo. IV. c. 48; but their clerk, not

being clerk of the peace, is not entitled to sign the summonses; and such defect of jurisdiction cannot be cured by the party appearing and pleading. — *Forrest v. Harvey*, 4 S. Bell, 197 (1845); Aff. 4 D. 97.

17. The funds of the Corporation of Edinburgh held not liable for failure on the part of the magistrates duly to execute statutory powers committed to them for the collection of a tax for the support of the clergy. — *Ministers of Edinburgh v. Lord Provost*, 6 S. Bell, 509 (1849); Aff. 7 D. 663.

18. Opinion that a grant in a charter to a burgh of tolls or goods passing through it is bad. — *Edinburgh and Glasgow Ry. Co. v. Mags. of Linlithgow*, 1 M.Q. 1 (1851); Rem.

19. A water company having contracted to supply a certain daily quantity of "good and wholesome water" to a town, in respect of which the corporation renounced the right to supply water to public works or private houses; held that the corporation was not prevented from allowing the streets to be broken up for the purpose of enabling mill-owners to lay pipes for bringing sea-water for the purposes to which it could be applied. — *Shaws Water Co. v. Mags. of Greenock*, 2 M.Q. 151 (1855); Aff.

20. A water company which supplies mills with power, held liable to be assessed on the sums received from the millers, although they were also assessed on the value of the mills. — *Greenock Trs. v. Shaws Water Co.*, 4 M.Q. 593 (1864); Rev. 24 D. 1306.

See APPEAL, 19, 81—CHARITY, 2—COLLEGE, 7—DAMAGES, 4—PARISH, 3, 4, 7, 19, 20—POOR-RATES, 2, 3, 4, 6—PROPERTY, 23, 24—PUBLIC WORKS, 11—SERVITUDE, 2, 6—STATUTE, 23, 26, 28—WAY, 2.

II. ELECTION OF MAGISTRATES.

21. An election of magistrates is not avoided by the apprehension of one and illegal seizure of another of the electors at the instance of the successful party (held proved by the Court of Session), where in any case the majority would have been on the same side. — *Smollett v. Buntein*, Cr. & St. 26 (1730); Rev.

22. The provisions in the Acts 1503, c. 80, 1535, c. 26, 1609, c. 8, requiring magistrates to be merchants residing, is in desuetude. — *Smollett v. Buntein*, 1 Cr. & St. 26 (1730); Rev.

23. A bond under penalty of 500 merks, and also "of being esteemed infamous and unfit for society," entered into by a majority of the electors of a burgh, binding themselves in the choice of magistrates "to give their votes plum to such persons as the major part of them shall think most worthy," is *contra bonos mores*, and invalidates the election. — *Hoggan v. Wardlaw*, Cr. & St. 148; 8 Br. P. C. 281 (1735); Rev.

24. In the election of a deacon of a trade, the old deacon who presided had a casting as well as a deliberative vote. The prescription of the statute ran from the date of election of the magistrates. An act of council cannot disqualify a candidate. — *Heriot v. Ray*, Cr. & St. 171 (1735); Aff.

25. An election reduced on ground of want of notice of meeting and other irregularities. — *Marquis of Lothian v. Haswell*, Cr. & St. 207 (1738); *Elchies v. Burgh*, No. 9.

26. On a secession of part of the electors, who proceed to election, their proceedings held void, and the election by the remaining electors valid. — *Ferguson v. Crie*, Cr. & St. 312 (1741); Aff.; *Elchies v. Burgh Royal*, 16.

27. Burgesses, not being councillors, not entitled to reduce the election of magistrates and town-council. The councillors of a burgh need not be resident, but the magistrates ought to be, and the town-clerk cannot hold office as magistrate. — *Robb v. Thomson*, 3 P. 21 (1785); Aff.; *Johnston v. Tenant*, 3 P. 22 (1785); Aff. M. 1888; *Munro v. Forbes*, 3 P. 23 (1785); Rev.

28. An election by the council in room of a deceased member, held void for want of due notice of the meeting to elect. — *Denny v. Marquis of Lorn*, 3 P. 516 (1796); Aff.

29. Election reduced on account of not being by a legal meeting. — *Masterton v. Meiklejohn*, 5 P. 298 (1820); Aff. M. *Burgh Royal*, App. 1, No. 17.

30. Election of councillors for life confirmed in special circumstances. — *Angus v. Montgomerie*, 1 S. Ap. 13; 3 Bligh, 98 (1821); Aff. F. C. 18th Jan. 1817.

31. A party who has several times taken advantage of a charter establishing a new sett cannot afterwards reduce it. — *Mags. of Montrose v. Mill*, 1 W. & S. 570 (1825); Rev. 2 S. 652.

32. Express written mandate is required to authorise a petition and complaint at the instance of an elector who has gone temporarily abroad, against an election of magistrates of a royal burgh; and the want is not cured by the appearance of counsel, or homologation by the party on his return — *Arbuckle v. Innes*, 2 W. & S. 528; 1 Bligh, N. S. 631 (1827); Aff. 5 S. 505.

33. Remit to inquire into the usage by which it was alleged the sett of the Royal Burgh of Kilrenny was altered. — *Gardner v. Reekie*, 2 W. & S. 531; 1 Bligh N. S. 646, (1827); Rem. 4 S. 539.

34. A reduction of the election of magistrates under the Stat. 16 Geo. II. c. 11, must be brought within two months. Costs must be given to the unsuccessful party under the statute. — *Tod v. Tod*, 2 W. & S. 542; 1 Bligh N. S. 637 (1827); Aff.

35. The sett of a burgh authorised the Council, in the case of election of an unqualified Dean of Guild, to elect another; held that they could not declare the unsuccessful candidate elected. By statute appeals against an election were to be brought within two months; held that the time in this case ran not from the original election, but from the time when it was irregularly completed by the declaration of the Council, that being the election complained of. — *Mags. of Dundee v. Lindsay*, 5 W. & S. 152 (1831); *Aff.* 8 S. 688.

36. The list of electors of the town council being directed to be made up from the roll of Parliamentary electors on the 16th September, an elector placed upon it is entitled to vote during the ensuing year, although in the mean time he has been expunged from the list of Parliamentary voters by decision of the Registration Appeal Court. Observed, that whether the validity of a burgh election can be tried or not by suspension, the Court ought not to interfere by interdict before it takes place. — *Monteith v. M'Gavin*, 3 S. & M'L. 290; 5 Cl. & Fin. 459 (1838); *Aff.* 16 S. 122.

37. Suspension and interdict, not combined with declarator, is not a competent process for bringing before the Court a disputed question respecting the election of a Provost. — *Flemming v. Dunlop*, M'L. & R. 547; 7 Cl. & Fin. 43 (1839); *Rev.* 16 S. 254.

See MEMBER OF PARLIAMENT, 1.

III. LIABILITY OF MAGISTRATES.

38. Magistrates of a burgh held liable conjunctly and severally for damage done by a riot in respect of non-performance of their duty to endeavour to suppress the riot. — *Weir v. Naismith*, 6 P. 678 (1743); *Rev.*

39. The magistrates of a burgh are liable for the debt if they fail to incarcerate the prisoner on his delivery to them by the messenger-at-arms, although he is only kept for ten hours in a room adjoining the court-house, and does not escape, if he is, in point of fact, not under restraint. Their full liability continues, although the debtor sues out a cessio, to which the creditor consents on part payment of the debt. — *Mags. of Annan v. Shortreid*, 3 P. 230 (1791); *Aff.* M. 11760.

40. The magistrates are liable for the escape of a debtor, though the prison was in good condition and the escape was effected by means of powerful tools. — *Mags. of Kirkcudbright v. Affleck*, 5 P. 254 (1809); *Aff.*

41. The magistrates having liberated a debtor in bad health on caution that he would reside in a fixed house within burgh, are not liable for the debt on the ground of the non-observance of the conditions, the creditor being aware of the non-observance. — *Ritchie v. Mags. of Canongate*, 5 Dow 87 (1817); *Aff.* F. C. 25 January 1814.

CAUTIONER.

I. CHARACTER AND OBLIGATIONS,	p. 76	III. DISCHARGE,	p. 78
II. FOR JUDICIAL OFFICER,	77	IV. PRESCRIPTION,	80

I. CHARACTER AND OBLIGATIONS.

1. A bond with a cautioner being granted, and afterwards a bond of corroboration of the former with another cautioner, the last-mentioned cautioner, on being compelled to pay, is entitled to relief from the first cautioner to the extent of one-half only. — *Murray v. Butler, Robert*. 465 (1724); *Aff.*; *M.* 14651.

2. A creditor claiming on the funds of his debtor is not bound to assign to postponed creditors a security which he holds from a cautioner. — *Bank of England v. Pulteney*, 3 *P.* 92 (1787); *Aff.*

3. A personal bond being granted by three parties conjunctly and severally, but bonds of relief being given by the principal debtor to the other two, and the principal being unable to pay, and one of the cautioners paying the whole; held that he is thereon entitled to rank on the estate of the other cautioner not for the whole, to the effect of getting payment of the half, but only for the half, "each of them being indebted as principal for one moiety, and as surety for the other moiety." — *Keith v. Forbes*, 3 *P.* 350 (1794); *Alt.* *Maxwell v. Heron*, *M.* 2136.

4. A bond being granted by one as principal, and another as "surety and principal payee," the latter is not entitled to benefit of discussion. — *Earl of Traquair v. Burrows*, 6 *P.* 99 (1815); *Aff.*

5. The trustee on the sequestrated estate of the principal debtor in a bond held, in special circumstances, not entitled to an assignation of a security over the cautioner's estate, although the principal and cautioner were partners — *Henderson v. Glynn*, 6 *P.* 207 (1815); *Alt.*

6. Cautioners in a limited sum for a bank agent, who becomes indebted in a larger amount to the bank and fails, are not entitled to have the dividends on his estate imputed in reduction *pro rata* of their liability, nor to an assignation to the bond, so as to draw dividends thereon. — *Balfour v. Borthwick*, 1 *S. Ap.* 131 (1822); *Aff.* *F. C.* 29th Jan. 1819.

7. Money being advanced on the joint security of two persons, both are liable as principals, although it was to pay off another debt in which one was only cautioner. Although giving time to a principal will release a surety, yet giving time to one of two joint debtors will not release the other. — *Robinson v. Edgars*, 2 *W. & S.* 106 (1826); *Aff.* 3 *S.* 513.

8. A cautioner for several original cautioners is entitled to relief in

full from each of the original cautioners, unless it clearly appears from the evidence that the intention was that the title to relief should be effectual only as regards part of the amount against each of the original cautioners. — *Inglis v. Walker*, 4 W. & S. 40 (1830); Aff. 5 S. 726.

9. A cash credit being granted by a bank to a party, for which he and two others became bound, the other two are merely cautioners, though not expressly named as such. — *Mackenzie v. Macartney*, 5 W. & S. 504 (1831); Rev. 8 S. 862.

10. A husband bound himself by antenuptial contract to invest a sum for himself and his wife in conjunct fee and life-rent only, and to the children in fee, and that on the demand of four persons named, and one of the trustees of the contract, who was not one of these four, bound himself, in case of the husband's failing to implement the obligation, to make it good; held that the husband was bound to make the investment, although not specially called upon; that his representatives were liable after his death; that the cautioner was entitled to the benefit of discussion; and that the burden of proving the insolvency of the principal before he was sued lay on the parties suing him. Bill passed on caution to try these questions. — *Wishart v. Wishart*, 2 S. & M'L. 564 (1837); Rev. 13 S. 769.

11. A surety for a commission-agent is not liable for the transactions prior to the date of the bond of caution, it speaking of goods "to be shipped," and containing no clause clearly extending the liability to prior transactions. — *Napier v. Bruce*, 1 S.; Bell 78; 8 Cl. and Fin. 470 (1842); Aff. 2 D. 556

See APPEAL, 79—CROWN, 6—DEBT, 6—EXECUTOR, 3—GUARANTEE, 7—MINOR, 15.

II. FOR JUDICIAL OFFICER.

12. A remit to consider whether cautioners for the receiver-general of land-tax are bound for intromission with funds of the Court of Session, placed under his control by a subsequent statute. — *Earl of Galloway v. Comrs. of Treasury*, 4 P. 165 (1800); Rev. M. Jurisdiction, Ap. M. 7.

13. Cautioners for *curator bonis* are liable for sums misapplied by the curator, though coming into his hands in consequence of extraordinary acts of management expressly authorised by the Court. — *Eaton v. Murdoch*, 3 W. & S. 246 (1828); Aff. 4 S. 688.

14. Question, Whether the cautioner for a factor appointed by tutors can be ordered to relieve the cautioner for the tutors without an express action of relief, but merely in actions not conjoined, at the instance of the pupil against each cautioner? — *Scot v. Stewart*, 7 W. & S. 211 (1834); 10 S. 392.

15. A bond of caution that a factor should do exact diligence in performing his duty, binds the cautioner to see that the factor accounts for intromissions, and pay all sums coming into his hand to the proper parties. — *Bremner v. Kerr*, 2 S. & M'L. 895 (1837); Aff. 14 S. 180.

16. The cautioner for a messenger is liable in damages to the party injured by any oppressive and illegal acts committed by the messenger in execution of a warrant. — *Grant v. Forbes*, 6 P. 731 (1759); Aff. M. 2081.

17. It is no defence to a messenger, or his cautioner, in an action for failure to execute diligence, that the grounds of debt on which it proceeded were vitiated and invalid. — *Wilson v. Maclellan*, 4 W. & S. 398 (1830); Rev. 7 S. 401.

18. A cautioner for a sheriff's-officer is liable for the expenses of an action against the officer for misperformance of duty, although the officer died before trial, and his representatives refused to appear. — *Dykes v. Struthers*, 7 S. Bell, 390 (1850); Aff. 9 D. 1437.

See BANKRUPTCY, 10.

III. DISCHARGE.

19. Four parties having granted separate bills in security of a debt, each bill being for one fourth part of the amount, the creditor on relieving one of the principal debtors from liability by acceptance of a substituted debtor, and obtaining part payment, is not entitled to sue the sureties, who had not expressly assented to the arrangement, for more than their *pro rata* share of the balance remaining due from the other principal debtors. — *Stirling v. Forrester*, 1 S. Ap. 37; 6 P. 480; 3 Bligh 575 (1821); Rev.

20. Cautioners for a bank agent are liberated if the bank permits the agent to persist in an improper course of business without notice to the cautioners, or if it accepts farther security from the agent on condition of giving him time. — *Thomson v. Bank of Scotland*, 2 S. Ap. 316 (1824); Rev. 1 S. 275.

21. A cautioner is not discharged by discharge of a principal on part payment, under express reservation of recourse against the cautioner, which was known to the cautioner. — *Smyth v. Ogilvies*, 1 W. & S. 315 (1825); Aff. 1 S. 159.

22. An heritable security for a debt being granted by an absolute disposition with back bond, to be held *a me* only, and sureties being bound for the same debt, in addition to the heritable security, without prejudice to the one or the other, but with the stipulation that, if called upon to pay, they should be entitled to a conveyance of the heritable security; and the debtor having taken infeftment, but neglected to get a charter of confirmation, so that he was evicted by the trustee

on the debtor's bankrupt estate, the cautioners are discharged by this neglect. — *Fleming v. Thomson*, 2 W. & S. 277 (1826) ; Rev. 4 S. 221.

23. Cautioners for a cash credit are discharged by the firm which grants it directing, without notice to the cautioners, the credit to be granted by drawing, on their account, on a bank with which they are connected ; and subsequent remittances, by the principal debtor, to the bank are to be imputed to the extinction of any balance for which the cautioners were liable at the date of the credit being transferred. — *Speirs v. Houston's Exrs.*, 3 W. & S. 392 ; 4 Bligh, N.S. 515 (1829) ; Rev. 4 S. 566.

24. A cautioner for a tenant having stipulated that the landlord " should be bound to exercise his right of hypothec before calling on " the cautioner, is not liable if the right of hypothec is not exercised with due diligence, or if the tenant is removed without concurrence of the cautioner. — *M'Tavish v. Scott*, 4 W. & S. 410 (1830) ; Rev. 5 S. 597.

25. Cautioners for a bank agent liberated by the bank intrusting him with unreasonably large sums without notice to the cautioners, and permitting a course of action at variance with the contract of agency, and taking a further bond of caution containing a proviso that the first cautioners should be discussed before it was sued on. — *Leith Bank v. Bell*, 5 W. & S. 703 (1831) ; Aff. 8 S. 721.

26. Cautioners for a cash credit under an agreement stating that the sum due shall be ascertained by an account certified by the bank account, are not liable for such part of a sum so stated as is made up of payments of drafts void under the stamp acts, as being post-dated or drawn beyond seven miles from the bank, and known by the bank agent, when paid, to be so dated or drawn. — *Swan v. Bank of Scotland*, 2 S. & M'L. 67 ; 10 Bligh, N.S. 627 ; 3 Cl. & Fin. 610 (1835) ; Rev. 13 S. 403.

27. If a creditor, without consent of the cautioner, give time to the principal debtor, the cautioner is discharged, provided the time is given by contract between the creditor and debtor ; but if the creditor merely delays or neglects to enforce his right, the cautioner is not discharged. — *Creighton v. Rankin*, 1 Robin. 99 ; 7 Cl. & Fin. 325 (1840) ; Aff. 16 S. 447.

28. A cautioner is discharged from liability by non-communication to him of facts affecting the credit of the party for whom he becomes bound within the knowledge of the party taking the bond, whatever the motive for such non-communication may have been. — *Railton v. Matthews*, 3 S. Bell, 56 (1844) ; Rev. 6 D. 536.

29. If a party, having reason to doubt the proceedings of his agent, requires from him further security, without communicating his doubts to the cautioners, the bond will be void, and evidence of such doubts

and concealment is admissible; but it is not necessary to prove that the concealment was wilful, or for the advantage of the principal. — *Smith v. Bank of Scotland*, 1 *Dow*, 272 (1813), *Rev.*; *Railton v. Matthews*, 3 *S. Bell*; 56 (1844); *Rev.*

30. It is not incumbent on a bank, in accepting cautioners for a cash credit, to disclose to them that the new credit was intended for the purpose of paying off an existing credit, unless the cautioners make the specific inquiry, in which case it must be averred as forming part of the contract. (Per Lord Campbell)—A disclosure need not be made voluntarily of any relation between the debtor and the bank, unless it be of such a nature as the cautioner could not naturally expect — *Hamilton v. Watson*, 4 *S. Bell*, 67; 12 *Cl. & Fin.* 109 (1845); *Aff.* 5 *D.* 280.

31. A cautioner for a bank agent (who binds himself to undertake no suretyship for another person) is discharged of liability, in all respects, by the bank imposing, without notice to the cautioner, a liability on the agent for one-fourth of the losses, although the loss sued for does not arise from such new liability. — *Bonar v. M'Donald*, 7 *S. Bell*, 379; 3 *H. L. Ca.* 226 (1850); *Aff.* 9 *D.* 1537.

See BANKRUPTCY, 65.

IV. PRESCRIPTION.

32. Although the payment of the money for which the cautionary obligation is given is not to take place for six years, the obligation prescribes in seven years from its date. It also prescribes, though there is no clause of, or separate bond of relief, if it appears on the face of the bond, that the cautioner has that character. But the plea of prescription may be elided by a promise to pay, or by a request for time, made by the cautioner, or by the tutor for his son, after the lapse of the seven years. — *Riddick v. Douglas*, 4 *P.* 133 (1800); *Alt. M.* 11032 and 11045.

33. When a cautioner is bound as co-obligant, without any clause of relief, the septennial prescription does not apply. — *Smyth v. Ogilvie*, 1 *W. & S.* 315 (1825); *Aff.* 1 *S.* 159.

34. A bond binding "A. as principal, and with and for him C. and D. as cautioners, sureties, and full debtors, jointly and severally," though without clause of relief or separate bond of relief, does not bind C. and D. after seven years, even though they may have paid interest after that time, the act not establishing a mere prescription but extinguishing the debt. — *Scott v. Yuille*, 5 *W. & S.* 436 (1831); *Aff.* 8 *S.* 485.

35. A bond of caution for intrusions in an office does not prescribe from seven years after its date, but from seven years after the party ceasing to hold the office; and it does not expire by the death of the cautioner (when it binds the cautioner, his heirs and executors),

but continues to bind the heirs, even when minors, for intromissions subsequent to the cautioner's death. — *Bremner v. Campbell*, 2 S. & M'L. 895 (1837); 1 S. Bell, 280 (1842); Aff. 1 D. 618.

See DEBT, 3—ERROR OF LAW, 2—PRESCRIPTION.

CHARITY.

I. PROPERTY OF, . . . p. 81 | II. BEQUESTS TO, . . . p. 81

I. PROPERTY OF.

1. Damages cannot be sued for from trustees of a charity in respect of an alleged breach of duty of the trustees in the execution of the trust, where if recovered they could only be paid out of the trust funds. — *Heriot's Hospital v. Ross*, 5 S. Bell, 37; 12 Cl. & Fin. 507 (1846); Rev. 5 D. 589.

2. Queen Mary having by charter, reciting that it was her duty to provide for the ministers of the Word, and to keep up hospitals for the poor, granted to a burgh certain property, and other property formerly vested in the burgh for charitable purposes having subsequently been used with it for providing stipends for the ministers; held that the burgh is bound to apply the income of the joint property for that purpose, including the income from any purchases made out of accumulations, but is to apply funds left specifically for other purposes to such other purposes. — *Mags. v. Presbytery of Dundee*, 4 M'Q. 228 (1861); Aff. 20 D. 840. See *Parish, Stipend*.

3. The site of the church of Trinity College and Almshouse in Edinburgh having been taken by a railway, under condition inserted in their act that they should either rebuild it in the same style and model, or pay to the town-council a sum of money "as compensation for the said church, and in lieu of the foregoing obligation," and the company having availed itself of this alternative; held that the town-council are not bound to spend the whole sum in rebuilding the church, or to rebuild it in the same style and model, but are bound to spend only a sufficient sum for that purpose, and in giving to the public the same use of the church as they before enjoyed, and to invest the balance for the advantage of the college. — *Clephane v. Mags. of Edinburgh*, 4 M'Q. 603 (1864); Rev. 22 D. 1222.

II. BEQUESTS TO.

4. A legacy to trustees, to be applied in aid of the institutions for charitable purposes, established or to be established in Glasgow or the neighbourhood thereof, at the discretion of the trustees, is not void for uncertainty, but observed that it should be applied to institutions

actually existing at the date when applicable. The next of kin may properly bring an action to compel the trustees to perform their duties properly. Costs allowed out of the estate where the next of kin disputed the validity of the above bequest. — *Hill v. Burns*, 2 W. & S. 80 (1826); *Aff.* 3 S. 389.

5. A bequest "to such charitable purposes and to such of my friends and relations as may be pointed out by my wife, with the approbation of the majority of my trustees," is effectual. — *Crichton v. Grierson*, 3 W. & S. 329; 3 *Bligh*, N.S. 424 (1828); *Aff.* 4 S. 552.

6. A will having given a sum of L.6000, together with the residue of the testator's estate, to a corporation to found an hospital similar to an existing named hospital, but declared that the sum should be invested and allowed to accumulate till it amounted to the sum of L.

sterling, and then should be employed for erecting and maintaining the hospital and educating boys,—the blanks in the sum and number make the whole gift void. (*N.B.*—This case declared by Lord Lyndhurst to be followed only where the circumstances are identical. — *Mags. of Dundee v. Morris*, 3 M'Q. 155.) *Ewen v. Mags. of Montrose*, 4 W. & S. 346; 2 *Dow & Clark*, 74 (1830); *Rev.* 6 S. 479.

7. A testator gave his property to trustees to be applied to such benevolent and charitable purposes as they think proper, and if amounting to L.600 or upwards, recommending to them to apply the income to payments to domestic servants, settled in Glasgow or the neighbourhood, producing testimonials of character after ten years' service. Held that neither the first nor second purposes were void for uncertainty; that the second was to take effect as to the whole sum, though it greatly exceeded L.600; that the recommendation was imperative, and that the next of kin might apply to the Court to compel the due application. Costs out of the estate. — *Miller v. Black's Trustees*, 2 S. & M'L. 866 (1837); *Aff.* 14 S. 555.

8. A gift of land to a college for the support of bursars, the college undertaking to support them equally with its other bursars, subject to a proviso for re-entry in case of failure, vests in the college for its own use any surplus of rents which may subsequently accrue. — *Jack v. Burnett*, 5 S. Bell, 409; 12 *Cl. & Fin.* 812 (1846); *Rev.* 6 D. 731.

9. A bequest to found an hospital for education of 100 boys of a certain town is not void for uncertainty, because of not specifying the sum to be applied, or the station in life of the boys, or whether they were to be clothed or fed. — *Mags. of Dundee v. Morris*, 3 M'Q. 134 (1858); *Rev.* 19 D. 918.

See ACTION, 2—APPEAL, 132—⁵⁶HEIR—~~TRUSTEES~~, 12.

CHURCH. See DISSENTERS—PARISH—PRESBYTERY.

COAL.

I. RESERVED RIGHT, . . . p. 83 | II. LEASES AND CONTRACTS, p. 83

I. RESERVED RIGHT.

1. The superior of lands who had reserved the coal therein, having been attainted, the reserved right passes with the superiority to the Crown, and the vassal, thought hereafter holding, under 1 Geo. I., of the Crown, does not acquire right to the coal. — *Mitchell v. York Buildings Co.*, 6 P. 795 (1777); Aff.

2. A proprietor having sold the *dominium utile* to A., reserving the coal, and binding himself, his heirs, and assignees, to pay any damage caused by working it, and having afterwards disposed the coal to B., taking him bound to pay damages in working, A. is bound to proceed for damages caused by the working against B. only, and cannot retain the feu-duties due to the proprietor of the superiority. — *Simson v. Ker*, 3 P. 238 (1792); Aff. M. 2692.

3. The superior of lands feued in runrig, having in his charter express right to the coal, fortified by proof of possession and working, while in the runrig feus there is no mention of coal in the dispositive clause, but only in the tenandas, he has right to work the coal under the feus. — *Anstruther v. Anstruther*, 3 P. 483 (1796); Aff. See Property, 14.

4. A feu having been granted reserving the coal, and the superiority by attainer having become vested in the Crown, which in a charter of novodamus (but not in the signature and warrant on which it proceeded) included the coal in the description of the lands, but subsequently sold the superiority, with the reserved right of coal, on which possession of the coal followed; held that the purchaser of the superiority had right to the coal. — *Anderson v. Cadell*, 4 P. 532 (1803); Aff.

5. Remit to consider how far acts of working coal at considerable intervals were sufficient to support prescription, on a charter under the Clan Act, against the purchaser of the superiority, to which a reservation of the coal had been attached. See 6 S. 167, for result of remit. — *Forbes v. Livingstone*, 1 W. & S. 657 (1825); Rem. 1 S. 282.

6. A party having a reserved right of coal in the lands of A. which he works, is not entitled to pump the water from the coal of the adjacent lands of B., leased by him, into the levels of A., from which it flows to the surface of the lands of A. — *Turner v. Ballendene*, 7 W. & S. 163 (1834); Aff. 10 S. 415.

II. LEASES AND CONTRACTS.

7. A coal lease being granted with privilege of communicating the

level to other neighbouring collieries, held that the privilege was available to neighbouring though not adjacent collieries, and was not put a stop to, as regards other collieries worked by the lessee, by the expiry of the lease in which it was contained. — *Earl of Abercorn v. Wallace*, 6 P. 757 (1764); *Aff.*

8. A coal lease having stipulated that the level of the coal should not be communicated to the coal of any neighbouring proprietor, except with consent of both lessor and lessee, the landlord is entitled to interdict against the tenant communicating it, except on such terms of payment to him by the neighbouring proprietor as he shall think fit; and if the communication is opened without his consent, he may compel the neighbouring proprietor to shut it up, and pay a fair compensation for the benefit derived from it while open. — *Wauchope v. Hope*, 2 P. 286, 338, and 519 (1773, 1774, and 1780); *Rev.*

9. An exception in a lease of coal of all the coal within the parks, gardens, and enclosures of the mansion-house, unless the consent of the lessor was obtained to its being wrought, does not authorise the lessor to work it himself. — *Earl of Wemyss v. Hope*, 3 P. 487 (1796); *Aff.*

10. Under a contract by lessees of a lime-kiln to take a certain quantity of "great chows and panwood" from the lessor's collieries, held competent to insert the word "coal" after "great," as it was evidently required by the context, and that the lessees, on a deficiency of the supply of coal, were still bound to take as much as could be furnished before resorting to other collieries. — *Wight v. Dickson*, 1 Dow, 141 (1813); *Alt.*

11. A condition in a lease of coal that it should come to an end, if, by unforeseen occurrences in the workings, the coal should become incapable of being wrought to advantage, does not avoid the lease on the coal becoming incapable of being wrought to advantage through a temporary fall in the market. — *Dixon v. Campbell*, 2 S. Ap. 175 (1824); *Aff.*

12. Interpretation of special stipulations in a contract for working coal. — *Cunningham v. Warner*, 2 S. Ap. 225 (1824); *Rev.*

13. When a lease of coal contains no provision respecting leaving a barrier of coal at the march, but contains a power to make communications into adjacent mines, and an authority to the lessor to inspect at any time, the lessee is not bound, by the general stipulation that he shall work the coal in a proper manner, to leave a barrier to prevent the influx of water from neighbouring mines. — *Craufurd v. Dixon*, 2 W. & S. 354 (1826); *Aff.* 2 S. 667.

14. A right to carry a level from a lower coal-field being granted to the proprietor of an upper coalfield—Question, How far, under the agreement, he was entitled to benefit by it in regard to the drainage of

a field belonging to the grantee, lying between the two to which the agreement referred? Interest given from the date of summons. — *Earl of Elgin v. Halkett*, 1 S. & M'L. 629 (1835); *Alt.* 11 S. 513.

15. Under a lease of a stratum of alum lying on the top of coal which had already been wrought out, leaving pillars, held that the landlord was not entitled to insist on the alum lessees consenting to the removal of the pillars, and the consequent working of the alum on the top of them, before they found such working profitable. — *Earl of Glasgow v. Hurlet Alum Co.*, 7 S. Bell, 100; 3 H. L. Ca. 25 (1850); *Aff.* 12 D. 704.

See BANKRUPTCY, 39, 59—MASTER AND SERVANT, 7, 8, 9, 10—
MINES AND MINERALS—PARTNERSHIP, 8.

COLLEGE.

1. An election to a professorship not being within the period fixed by the founder's deed, is void, and the right to elect devolves on those next named in the deed. — *Brown v. Chalmers*, 6 P. 663 (1734); *Aff.*

2. Special question as to the power of Marischal College, Aberdeen, to confer degree of doctor of law. — *Catanach v. Gordon*, Cr. & St. 401 (1745); *Rev. M.* 12253.

3. Practice of the University of Aberdeen in regard to the election of officers. Held that the principal has not a double vote. — *Thom v. Dalrymple*, 6 P. 737 (1763); *Aff.* See Patronage, 8.

4. An election of two persons as joint-professors, the foundation only speaking of the election of one, is void. Question as to the notice necessary to be given of a contemplated election. — *Arnot v. Hill*, 5 P. 256 (1809); *Rev. M. College, Ap. No.* 3.

5. A statute having declared that elections should for the future be as heretofore usual, and it appearing that the principal had formerly voted, he is entitled both to an original and a casting vote, although subsequently to the statute a principal had renounced the privilege. — *Playfair v. Macdonald*, 5 P. 266 (1809); *Rev.*

6. The University of Glasgow is a corporation, and may grant degrees in surgery but not in medicine. — *University v. Faculty of Physicians of Glasgow*, 2 S. & M'L. 275; 1 Robin. 397; 7 Cl. & Fin. 958 (1840); *Aff.* 15 S. 736.

7. The University of Edinburgh was the college of the town, and therefore the town-council had exclusive right to give directions respecting the granting of degrees and the government of the college, and course of study. — *University v. Mags. of Edinburgh*, 1 M'Q. 485 (1854); *Aff.* 14 D. 74.

See CHARITY, 8.

CONQUEST.

1. Conquest in a question of succession includes lands, adjudications, and heritable bonds acquired by the deceased, whether infetment had passed on them or not, and whether in his own name, or in that of trustees for him; and it also includes bonds of corroboration, secluding executors, of heritable bonds as regards the capital sums. But moveable bonds secluding executors, bonds of corroboration of them, and bonds accumulating the arrears of heritable bonds into capital, do not fall under conquest. Teinds purchased by the deceased of lands which had descended to him, and the *dominium utile* also purchased by him (taking the conveyance with procuratory of resignation *ad reman.* whether executed or not), the superiority having descended to him, do not fall under conquest. — *Earl of Selkirk v. Duke of Hamilton, Cr. & St.* 271 (1740); *Aff.*; *Elchies v. Heritage & Conquest*, No. 3.

2. Conquest under a marriage contract does not include heritage purchased during the marriage with funds belonging to the husband before the marriage. — *Fairie v. Watson*, 2 P. 213 (1770); *Aff.*

3. Property being conveyed to trustees, with direction to pay the rents to A. during his life, and if he married and had children, to convey the fee to him, and if not, then to B. and his heirs and assigns; and B. having predeceased, and A. died unmarried, the heir of line, and not of conquest, of B. is entitled to the fee, it never having vested in B. himself. — *Miller v. Miller*, 7 W. & S. 1 (1833); *Aff.* 9 S. 295.

See PROVISION TO CHILDREN, 2, 8.

CONTRACT.

I. GENERAL RULES, . . .	p. 86	III. SALARY AND SERVICES, . . .	p. 88
II. BUILDING AND WORK, . . .	87	IV. ILLEGAL, . . .	88

See also BOND—LANDLORD AND TENANT, 9.

I. GENERAL RULES.

1. Where registration is essential to a contract, and two deeds are executed, one of which is registered, but the other, modifying it, is unregistered, the registered deed is alone regarded (Compromised). — *Cuming v. Ferguson, Robert.* 577 (1726); *Aff.*

2. Question, whether a letter by a creditor to a debtor was a contract to concur in personal protection to him on certain terms, and whether the terms were observed, and whether the debtor was entitled to suspend a charge without finding caution *judicio sisti*. — *Allan v. De Voz*, 5 P. 110 (1806); *Aff.*

3. A widow having bound herself to pay her husband's debts out of

her separate estate, she is not entitled to be set free from it on her estate proving so deficient in value that the debts could not be paid off within the time originally contemplated. — *Rundell v. Lady Montgomerie*, 1 W. & S. 112 (1825); *Rev.* 2 S. 207.

4. An agreement by a canal company before its formation, that on a quarry being wrought up to it, they should pay the value of the rock below the canal, is not a sale of the rock to them, and therefore interest is not due on the value from the date of agreement, but only from the date at which, after the quarry was wrought fully up, a demand was made on the company for consignment of the value. — *Union Canal Co. v. Carmichael*, 1 S. Bell, 316 (1842); *Rev.* 2 D. 23.

5. A conveyance of land with liberty to take water from a stream by a pipe not exceeding twelve inches diameter, does not imply a right to dam the stream so as to keep the pipe always full. — *Walker v. Stewart*, 2 M'Q. 424 (1855); *Rev.*

6. A right may be acquired under a contract by one who is not named in it, but it can only be acquired if the parties contracting intended that their contract should be for the benefit of the third party individually, and not merely as one of the public. — *Peddie v. Brown*, 3 M'Q. 65; *Aff.*; *Finnie v. Glasgow & S. W. Ry. Co.*, 3 M'Q. 75 (1857); *Aff.* See Law-Agent, 20, 22.

See INTEREST, 10—PRINCIPAL AND AGENT—PUBLIC WORKS, 18, 20, 21, 22, 25.

II. BUILDING AND WORK.

7. A contract for building a bridge having referred to a plan signed by the parties which showed no foundations, and stated nothing about the foundation, the builder is not bound to excavate or drive piles so as to make a secure foundation; and if that course appears necessary after examination of the bed of the river, both parties will be freed from the contract, and the contractor may sell off the materials used or prepared, on refunding any sum already paid him. — *Mags. of Rutherglen v. Cullen*, 2 P. 305 (1773); *Aff.*

8. In a building contract, containing a penalty in the event of non-completion by a certain date, the penalty cannot be enforced unless it is proved that the delay was through the fault of the builder. — *Jones v. Lindsay*, 3 P. 563 (1797); *Aff.*

9. Question with reference to the conformity of houses built on a feuing plan with the articles of sale. — *Jameson v. Russell*, 6 P. 29 (1814); *Aff.*

10. Extra charges by a builder allowed. — *Hay v. Scott*, 6 P. 146 (1816); *Aff.*

11. A shipbuilder desired to state, and stating, the rate of wages with reference to intended work, is not entitled to charge a higher rate on the

wages being raised by authority of justices of the peace during the work. — *Strachan v. Paton*, 3 W. & S. 19; 3 *Bligh*, N. S. 359 (1828); *Aff.* 3 S. 529.

12. Failure to use the precise materials stipulated is a ground for damages, though the substitute materials were *bonâ fide* supposed to be as good, but were not really so. — *Strachan v. Paton*, 3 W. & S. 19; 3 *Bligh*, N. S. 359 (1828); *Aff.* 3 S. 259. See Appeal, 131.

See ARBITRATION, 1—SHIPPING.— 11

III. SALARY AND SERVICES.

13. Correspondence on which it was held that a factor's salary was to be fixed at L.450 instead of L.550, as the Court of Session had fixed it. — *Duke of Queensberry v. M'Murdo*, 4 P. 565 (1804); *Alt.*

14. A contract being entered into by a company with its manager, who undertook, for the salary stated, to devote his whole time to its affairs, and do, in addition to the duties specified, whatever else might be required of him for the interest and advantage of the company; held that it did not exclude a claim for further salary, in respect of the performance of special work, and of the superintendence of work which, at the time of the contract, formed a separate branch of the establishment. — *Hamilton v. Geddes*, 4 P. 657 (1805); *Aff.* See Interest, 3—Partnership, 13.

15. A factor having annually settled accounts on the footing of his salary being L.100 a year, he is not entitled to claim further allowances, or legacies bequeathed him, but revoked. — *Rose v. Earl of Fife*, 5 P. 115 (1806); *Aff.* See Acquiescence, 6—Bank, 4.

16. An officer having undertaken to procure a commission for another, and for that purpose lodged the price with agents, who failed, he is liable for the price, and also for the pay which would have been due had it been received, up to the date at which a commission was obtained from another quarter. — *Macdonald v. Elder*, 5 P. 542 (1811); *Aff.*

IV. ILLEGAL.

17. A contract to grant a policy of insurance, which policy would be illegal, but of the illegality of which no notice was given to the insurers, nor the policy ever delivered, founds an action of damages, in which the loss intended to be covered by the policy forms the measure of damages. — *Albion Ins. Co. v. Mills*, 3 W. & S. 218; 2 *Bligh*, N. S. 519; 1 *Dow & Cl.* 342 (1828); *Aff.*

18. Action cannot be maintained in respect of a contract which, though *ex facie* legal, is shown by subsequent circumstances to have been intended to be carried out illegally. A ship despatched to a foreign port, and having there transhipped into her goods which could not have been legally exported in her, but which were despatched a

few days after her on purpose to be so transhipped, is liable to condemnation as fully as if she had had the goods on board when she sailed, and the whole transaction of her despatch is illegal. — *Stewart v. Gibson*, 1 *Robin*. 260; 7 *Cl. & Fin.* 706 (1840); *Aff.* 12 S. 683.

See BILL, 1—LAW AGENT, 8—PAWNBROKER.

CONVEYANCING.

I. TITLE AND CONVEYANCE, . . . p. 89	III. ERRORS AND LATENT INCUMBRANCES, p. 90
II. PAYMENT OF PRICE, 90	

See also HEIR—ENTAIL—PROPERTY—PROVISION TO CHILDREN—SALE.

I. TITLE AND CONVEYANCE.

1. An absolute conveyance of lands not followed for many years by possession, which it was admitted by the grantee was to allow of the lands being redeemed, is not reducible after the grantee has at last been for many years in actual possession. — *Douglas v. Wilson*, 5 P. 303 (1810); *Aff.*

2. On a sale of lands, with transfer of possession and part payment, but without delivery of the disposition, adjudication for a debt of the vendor subsequent to the minute of sale does not exclude the purchaser. *Haldane v. Anstruther, Robert.* 601 (1727); *Aff. M.* 14174.

3. An absolute disposition being granted for a full price, with back-bond of redemption within five years, on the expiry of that time the disposition becomes irredeemable without declarator. — *Boyd v. Steel*, 2 P. 368 (1775); *Aff. M.* 7221.

4. The proprietor of a house having by letter accepted an offer to purchase it, and “obliged himself, his heirs and executors, to give up to the purchaser all his rights and titles with full warrandice clear at the term of Martinmas next,” he is bound to implement the sale and make a good title, free from incumbrances, and is not entitled to refuse and offer to renounce the sale. — *Bruce v. Cleghorns*, 3 P. 5 (1785); *Aff.*

5. A purchaser of lands being sued by the heir of the seller's ancestor, on the ground that the seller had no power to sell, cannot defend himself by impeaching the title of the seller's ancestor, from whom the title of both parties is deduced. — *Livingston v. Warrack*, 6 P. 790 (1773); *Aff. M.* 7847.

6. Adjudication in implement cannot proceed on a disposition *ex facie* absolute, qualified by a back-bond in trust, there being another party in actual possession, though uninfert. — *Dunlop v. Cochrane*, 2 S. Ap. 115 (1824); *Aff. F. C.*, 4th July 1820.

7. Although the rule in Scotland (differing from that in England) is, that on a sale the vendor shall both prepare and pay the cost of the

conveyance; yet where by a Public Works Act the land of an individual is authorised to be taken at a price to be fixed by a jury, the cost of the conveyance is to be paid by the purchaser. — *Reddie v. Higginbotham*, 4 S. Bell, 268 (1845); Aff.

8. A power may in Scotland, as in England, be exercised without express reference to the deed creating it, but while in England proof of the intention to exercise the power must be given by the party taking under the alleged exercise, in Scotland the *onus probandi* lies on the party alleging that it was not intended to be exercised. — *Cunninghame v. M'Leod*, 5 S.; Bell, 210 (1846); Aff. 3 D. 1288.

See FORFEITURE, 9, 10—HEIR, 15—OUTLAW.

II. PAYMENT OF PRICE.

9. A contract of sale having stipulated that the disposition should be delivered on 1st November and the balance of the price paid on the 11th, and possession having been given prior to November, the vendor, on tendering the conveyance, is entitled to demand heritable security for the price, and to refuse delivery till it is given, and to compel the purchaser to accept it on these terms. — *Haldane v. Anstruther, Robert*. 601 (1727); Aff. M. 14174.

10. On a sale of lands on which creditors have claims, and for which they arrest the price in the purchaser's hands, he is not entitled to resale, but the proper course is to bring all the creditors of the vendor into a multiplepoinding, and on payment of their debts thereunder the purchaser is entitled to absolute warrandice of the several discharges and to an assignation of the debts. — *Haldane v. Anstruther, Robert*. 601 (1727); Aff. M. 14174.

11. A purchaser failing to find satisfactory caution for the price in terms of a minute of sale, cannot compel implement of the sale. — *Anderson v. Anderson*, 2 P. 22 (1759); Aff.

III. ERRORS AND LATENT INCUMBRANCES.

12. A sale of an estate, under an Act of Parliament, which described it as then let on lease to certain tenants, held not to include the right of reversion to certain wadsets not in fact so leased, but included in the decree of sale made in the Court of Session. — *York Bgs. Co. v. Ferguson*, 2 P. 541 (1780); Rev.

13. In a judicial sale the teinds were represented as valued and exhausted, as proved by a sub-valuation (which the purchasers had opportunity of inspecting), and stated in an interlocutor of the Court, but after the sale it was discovered that the sub-valuation was irregular and invalid; held that the purchaser was not entitled to an abatement from the price. — *Ferguson v. Mossman*, 3 P. 531 (1797); Aff.

14. In a judicial sale of two properties the boundary was marked on a plan, but in the description it was said to be a burn. Held that after the lapse of many years, during which the plan had been followed as giving the boundary, it was incompetent to revert to the description, it being alleged that the course of the burn had meanwhile changed. — *Glassell v. Earl of Wemyss*, 5 P. 104 (1806); *Aff.*

15. A disposition of "the just and equal half of the nine-shilling land of old extent in the Garth quarter, commonly called Bullshill," carries the whole land called Bullshill, being one-half the nine-shilling land. — *Forrester v. Macgregor*, 1 S. & M'L. 441 (1835); *Aff.* 9 S. 675.

16. A general conveyance of all a deceased party's estate cannot be set aside on the ground that part of it had been sold for taxes. — *Robertson v. Pattinson*, 5 S. Bell, 259 (1846); *Aff.* 6 D. 945.

17. Lands being sold with entry at Whitsunday 1807, and assignation of rents for crop and year 1807, the purchaser has not right to the rent paid at Whitsunday and Lammas 1807. — *Sheppard v. Watherston*, 5 Dow, 278 (1817); *Aff.* See Landlord and Tenant, *Construction of Lease*.

18. A purchaser of an estate discovered subsequently to be held subject to a right of pre-emption by the superior, held entitled to retain it as against the son of the vendor, on giving him a guarantee that he would not claim under the warrandice in the conveyance in the event of being evicted by the superior. — *Scotland v. Mercer*, 1 Dow, 229 (1813); *Aff.*

19. The seller of growing timber, to be cut by the purchaser immediately, having two years afterwards sold the lands, not knowing that the wood had not been cut, held not liable in repetition of the price of the wood to the purchaser of the land. Remit to consider whether the purchaser of the lands, having notice that the wood had been sold, can take advantage of the delay in cutting it to stop its removal. — *Duff v. Brown*, 6 P. 332 (1817); *Rev.*

20. A house being sold for L.90, and on condition that the purchaser should procure for the vendor an ensign's commission, and discharge an heritable debt on the house, which was stated by the vendor not to exceed L.90, and it afterwards appearing that by arrears of interest the heritable debt had been largely increased, on which the purchaser refused to procure the commission, the vendor was held bound to relieve the purchaser of all the debt above L.90, and the purchaser only liable for the price of the ensign's commission and interim interest thereon, but not for the pay of an ensign. — *Cargill v. Craigie*, 1 S. Ap. 134 (1822); *Alt.*

21. A purchaser is not liable for melioration claimed by a tenant not under his lease, but under a separate agreement with his landlord; but the vendor may have relief against the purchaser if there was a general

arrangement in the contract of sale that the purchaser should pay such meliorations, and he has notice, before the disposition is executed, that the particular one sued for exists. — *Bruce v. M'Leod*, 1 S. Ap. 213 (1822); *Alt. See* Landlord and Tenant, 11.

22. A purchaser of an estate on which it afterwards appears that there is a latent burden under a lease, but not discoverable from the lease, and unknown to him, is entitled to be relieved of it out of the price. — *Ferrier v. Mudie*, 1 S. Ap. 455 (1823); *Aff.*

23. A purchaser of land who has refused an offer of *restitutio in integrum* is not entitled to damages from the seller, on the ground that by a concealed lease the land was rendered inapplicable to the purpose for which he had bought it. — *Reddie v. Syme*, 6 W. & S. 188 (1832); *Aff.* 9 S. 413.

24. An assignation of rent intimated to the tenant, but not followed by actual receipt of rent from him, is void against a purchaser of the estate without notice. — *Balfour v. Lyle*, 2 S. & M'L. 1 (1835); *Aff.* 11 S. 906.

See ^{2W}LAND AGENT, 12, 14

COPYRIGHT.

1. In an action for penalties under 8 Anne, c. 19, it is improper to combine conclusions for damages at common law, or to join as pursuers parties claiming distinct rights in different books. — *Midwinter v. Kincaid*, Cr. & St. 488 (1751); *Alt. M.* 8295.

2. Although the Copyright Act, 8 Anne c. 18, gave penalties only in the case of works entered at Stationers' Hall, and there had been found to be no common-law right of literary property, yet as the Statute declared the exclusive property to be vested in the author for a certain term, he has during it a right to sue for damages, or for interdict, in the event of such right being infringed. — *Cadell v. Robertson*, 5 P. 493 (1811); *Rev. M. Literary Prop. Ap. No. 5. See* Corporation, 4.

3. In an action for breach of copyright, the ownership may be proved without production of a formal assignment. Opinion that a receipt for the price by the author is sufficient. — *Kyle v. Jeffreys*, 3 M'Q. 611 (1859); *Aff.* 18 D. 906.

CORPORATION.

See also BURG⁴H.

1. A corporation having passed a rule granting allowances at a fixed rate to reduced widows of members, if of good character, a widow fall-

ing under these conditions is entitled to compel payment to her of the allowance so long as the corporate funds permit. — *Flethers of Glasgow v. Nelson*, 3 W. & S. 209; 3 Bligh, N.S. 384 (1828); Aff. 4 S. 405.

2. A summons in the name of certain individual office-bearers of the Society of W.S. cannot be sustained, whether they are a corporation or not. Query, Whether they are a corporation? A corporation cannot pass by-laws not consistent with the general law of the country. — *Graham v. Writers to the Signet*, 1 W. & S. 538 (1825); Rev. 2 S. 214.

3. A corporation may be established in Scotland without any charter from the Crown, either by the burgh corporation or lords of the barony or regality. No name or special form of words is necessary for its constitution, and it may make by-laws affecting others besides its own members. — *University v. Fac. of Physicians, &c., in Glasgow*, 2 S. & M'L. 275; 1 Robin. 397; 7 Cl. & Fin. 958 (1840); Aff. 15 S. 736.

4. The grant of a corporation having conferred right to a penalty for breach of their privileges, it does not take away the common-law right of interdict. — *University v. Fac. of Physicians, &c., of Glasgow*, 2 S. & M'L. 275; 1 Robin. 397; 7 Cl. & Fin. 958 (1840); Aff. 15 S. 736.

5. Question, Whether the Convention of Burghs is a corporation, being annually dissolved, and not adjourned? Judgment, that in any case its clerk's salary being voted annually, it may be reduced at pleasure, and opinion that the terms of appointment do not confer the office for life. — *Convention of Burghs v. Cunningham*, 1 S. Bell, 628; 9 Cl. & Fin. 144 (1842); Rev. 1 D. 1077.

6. Action lies for damages against the individual members of a corporation or other body if they refuse to perform ministerial duties to the injury of any person. — *Ferguson v. Earl of Kinnoull*, 1 S. Bell, 662; 9 Cl. & Fin. 251 (1842); Aff. 3 D. 778.

7. A society which by its articles and its charter has power to assign a portion of its funds to the relief of indigent members, and their widows and children, has power to vote a contribution to a widows' fund established by some of its members, and to assign to it part of the entrance fees of members. Opinion that a member assenting to this arrangement for some years is barred *personali exceptione* from claiming repetition of the sums paid. — *Ellis v. Henderson (Soc. of S.S.C.)*; 3 S. Bell, 1 (1844); Rev. 4 D. 370.

8. The presence of parties, afterwards found to be disqualified, in a corporation or church court does not avoid its acts. — *Livingstone v. Proudfoot*, 6 S. Bell, 469 (1849); Aff. 8 D. 898.

See APPEAL, 80, 81.

COUNSEL.

1. A bond of annuity given to an advocate in consideration of his management of the grantor's law affairs, the annuity to continue so long as he had any law affairs, may be sued upon by the grantee's assignees after his death for arrears from the date of granting, and being impro-
bative, the question whether holograph allowed to be referred to the grantor's oath, and on his failing to depone, he is held confessed. — *Fraser v. Sandilands*, *Robert*. 209 (1718); *Aff.*

2. Bonds of annuity to an advocate for professional services done, and to be done, are valid. — *Coms. of Forf. v. Lockhart*, *Robert*. 514 (1725); *Aff.*

3. Counsel called upon by the opposite party to depone whether they had not seen a cancelled deed in their client's hands, and on their refusal to depone, judgment given against their client on the point. — *Schaw v. Houston*, *Robert*. 561 (1725); *Aff.*

4. Counsel or agents drawing pleadings are responsible to the Court for their propriety. — *Hamilton v. Anderson*, 3 *M'Q.* 363 (1858); *Aff.*

5. Counsel have authority to refer an action to arbitration without special instructions. — *Mackenzie v. Girvan*, 2 *S. Bell*, 43 (1843); *Aff.* 3 *D.* 318. *See also* Arbitration, 6.

6. Question whether the Dean of Faculty or King's Counsel have precedence at the bar. — *Crichton v. Grierson*, 3 *W. & S.* 333 (1828).

7. Protest of precedence over Queen's Counsel made by Dean of Faculty. — *Bank of Scotland v. Gardyne*, 1 *M'Q.* 359 (1853).

See ACTION, 24—APPEAL, *Appeal Cases*—BURGH, 32—
ENTAIL, 170.

COURT OF SESSION.

I. JURISDICTION, . . . p.	94	III. JUDGMENTS, . . . p.	96
II. JUDGES,	96		

I. JURISDICTION.

1. A claim for casualties, alleged to be granted in a Crown charter, must be decided by the Court of Session, and not in the Court of Exchequer. — *Dundas v. Lord Advocate*, 2 *P.* 516 (1779). But the point not reported. *See* the Appeal Cases.

2. The Court of Session is entitled to punish with imprisonment and other penalties a witness prevaricating in his evidence in a civil suit, but appeal lies against the sentence. — *Carse v. Lord Advocate*, 3 *P.* 1 (1781); *Aff.*

3. The Writers to the Signet cannot by action against the Solicitors before the Supreme Courts impeach the appropriation to them of seats in Court by the Court of Session. — *S.S.C. v. W.S.*, 1 W. & S. 348 (1825) ; Aff. 2 S. 753.

4. The Court of Session has jurisdiction to keep inferior Courts, including Presbyteries, from transgressing the law, or exceeding their jurisdiction, even where their decision is by statute final on the merits ; in all Courts not exempted by statute any proof led must be taken in writing, whether the decision on it be subject to appeal or not, and proceedings against a schoolmaster, under 43 Geo. III. c. 54, form no exception to this rule. — *Campbell v. Brown*, 3 W. & S. 441 (1829) ; Aff. 3 S. 480, and 4 S. 174. See Patronage, 13.

5. The Court of Session has jurisdiction on matters of law in an advocacy from the Justices of the Peace, although the statute on which they proceed gives only a summary remedy before them. But when an offence is to be proved before the Justices, the Court can only remit to them to take the evidence with a declaration of the law. — *Morrison v. Mitchell*, 4 W. & S. 162 (1830), and 3 S. & M'L. 285 (1838) ; Aff. 5 S. 909 ; 10 S. 230.

6. Where a statute gives to the Sheriff exclusive jurisdiction in all actions or suits relative to the Act, it is incompetent to bring an action of declarator of right in the Court of Session in regard to a matter arising under the act respecting which the Sheriff has power to give a sufficient remedy. — *Balfour v. Malcolm*, 1 S. Bell, 153 ; 8 Cl. & Fin. 485 (1842) ; Aff. 2 D. 329.

7. When, on a lunatic being apprehended by warrant obtained by the Procurator-Fiscal, his relatives enter into a bond to keep him in safe custody, the Court of Session cannot reduce the bond, the Sheriff and Court of Justiciary alone having jurisdiction. — *Mackenzie v. Scott*, 6 S. Bell, 84 (1847) ; Aff. 8 D. 271.

8. A statute having authorised review of the decision of the Sheriff by appeal to the Court of Justiciary, on certain grounds, among which incompetency, including defect of jurisdiction, is mentioned, and having declared that no decision under the authority of the act should be otherwise reviewed, the Court of Session cannot reduce a decision of the Sheriff on the ground of his not having had jurisdiction. — *Graham v. Mackay*, 6 S. Bell, 214 (1848) ; Aff. 7 D. 515.

9. The Court of Session is not deprived of its jurisdiction by implication from the Court of Exchequer being vested by statute with jurisdiction. — *Evans v. M'Loughlan*, 4 M'Q. 86 (1861) ; Aff. 21 D. 532.

See ADJUDICATION, 5—ADMIRALTY—ALIEN, 2—APPEAL, 100—
CROWN, 5—ENTAIL, 168—FORFEITURE, 1—SHERIFF.

II. JUDGES.

10. The Union, Article 19, enacts "that none shall be named ordinary Lords of Session but such as have served in the College of Justice as advocates or principal clerks of Session for the space of five years." An advocate of nearly seven years' standing, who had personally attended the Court during fifteen months only out of forty during that period, and had been absent during the rest of the time in London in attendance on Parliament as a member, was held qualified under the Article. (New act passed in 1724.)—*Haldane v. Fac. of Advocates*, Robert. 422 (1723); Rev.

11. A Judge is not liable to an action of damages for words spoken from the Bench censuring the general professional conduct of a practitioner in his Court. — *Miller v. Hope*, 2 S. Ap. 125 (1824); *Aff. F. C.*, 1st June 1821. See Justice of Peace, 4.

12. A Judge who has acted as leading counsel for a party properly declines giving his opinion or vote in deciding the case. Before the Judicature Act (1825), a Judge promoted after the hearing, as well as one who had heard the argument, but who retired before considering matter *noviter veniens*, was not computed. — *Innes v. Exrs. of Duke of Gordon*, 4 W. & S. 305 (1830); *Aff.* 6 S. 279. See House of Lords, 15, 16.

III. JUDGMENTS.

13. No regulation would be more advantageous, in cases of appeal, than for some mode to be devised for the Judges to send us an authentic statement of the grounds of judgment. (Per Lord Eldon.) — *Wilson v. Alexander*, 5 P. 189 (1807).

14. Observations (by Lord Brougham) on the impropriety of the Court below stating their dissent from the judgments of the House. — *Gordon v. Anderson*, 7 W. & S. 545 (1835); 11 S. 647.

15. Observations on the duty of the Court to state the reasons of its judgments. (Per Lord Brougham.) — *Glendonwyn v. Gordon*, 3 S. & M'L. 76 (1838).

16. Observations on the propriety and advantage of written opinions in moving judgment in all Courts. — *Presbytery of Auchterarder v. Earl of Kinnoul*, M'L. & R. 316; 6 Cl. & Fin. 646 (1839).

17. The Court ought to give its reasons in giving judgment. (Per Lord Brougham.) — *Stewart v. Gibson*, 1 Robin. 277 and 285; 7 Cl. & Fin. 706 (1840).

See APPEAL, 5.

CROWN.

I. PROPERTY OF,	p. 97	III. GRANT BY,	p. 97
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I. PROPERTY OF.

1. A grant of the Orkney Islands, part of the Crown's annexed property, being made, and the grantee having heritably burdened the same, and the grant being afterwards reduced as illegal, but afterwards a second grant being made by Act of Parliament of the same lands to a descendant (though not a legal representative) of the same family, the heritable security does not revive, so as to attach to the new grant. — *Brown v. Earl of Morton*, Robert. 254 (1720); Aff.

2. Held that a Crown charter granting the right of entering vassals, and receiving casualties, in Orkney and Zetland, to a subject, as *ultra vires*, and its ratification by a private Act of Parliament immaterial, being subject to the Act *salvo jure*, of the same Parliament. — *Dundas v. Lord Advocate*, 2 P. 516 (1779); Aff. M. 15103.

3. The statutory trustees of a navigable river having, on resuming ground which had once formed part of the bed, agreed to give compensation to the private parties who had claims upon it, the Crown is not entitled to require the compensation to be paid to it, as owner of the bed. Costs not given against the Crown. — *Lord Advocate v. Hamilton*, 1 M'Q. 46; 1 Stu. 644 (1852); Aff. 11 D. 391. See Property, 26.

II. DEBT DUE TO.

4. The Crown has no preference in the case of adjudications of real estate. — *Murray v. Thomson*, Cr. & St. 594 (1755); M. 7073.

5. A suit for a Crown debt in Exchequer is no bar to an action in the Court of Session for attaching the debtor's heritage. — *Earl of Galloway v. Comrs. of Treasury*, 4 P. 165 (1800); Aff. M. Jurisdiction, Ap. No 7.

6. The Crown cannot seize by extent property which its debtor had before the teste of the writ conveyed to trustees for relief of parties who had become cautioners for him, and which assignation had been intimated. — *Spears v. Lord Advocate*, M'L. & R. 585; 6 Cl. & Fin. 180 (1839); Rev. See LANDLORD AND TENANT, 19.

III. GRANT BY.

7. A grant by patent of a right to print Bibles, &c. reciting an undertaking by the grantee on behalf of himself, his heirs, partners, and assignees, but made only to himself, authorises an assignation of the right in whole or part, and the assigner's right does not fall by failure in the grantee to take the oath requisite. The Sovereign can grant a

sole right of printing Acts of Parliament and “the books of the Common and Municipal laws of Scotland.” — *Baskett v. Watson, Robert.* 197 (1717); *Aff. M.* 13254.

8. The King by his prerogative had the right of granting in England and in Scotland an exclusive right of printing the Bible, Common Prayer, Psalms, Confession of Faith, and Catechisms, and the grantees were entitled to prevent the importation of copies printed out of the respective kingdoms. — *Manners v. Blair*, 3 *W. & S.* 268; 3 *Bligh N. S.* 391 (1828); *Alt.* 4 *S.* 559.

9. The grant by charter of the office of Keeper of Holyrood Park does not convey any feudal right in the property of it, and cannot, by possession or usage, be converted into a right of property in the soil, and though the grant is “with all emoluments,” the Keeper is not entitled to work, for his own profit, even quarries in use to be worked. — *Officers of State v. Earl of Haddington*, 7 *W. & S.* 468 (1826); *Rem.* 2 *S.* 420; and 5 *W. & S.* 570 (1831); *Rev.* 8 *S.* 867.

10. A grant by the Crown for a period beyond the Sovereign’s life of an office of Receiver, with a salary beyond the whole receipts charged on other land revenues, is a covert form of granting a pension, and is illegal. — *Lord Dunglas v. Off. of State*, 1 *S. Bell*, 537; 9 *Cl. & Fin.* 173 (1842); *Aff.* 1 *D.* 300.

See ADMIRALTY, 3—PATRONAGE, 2, 3, 4, 7, 11—PROPERTY, 6—PUBLIC OFFICE, 12—SALMON FISHING—SANCTUARY.

DAMAGES.

I. FOR ILLEGAL ACTS,	p. 98	III. ACTIONS AGAINST PUBLIC OFFICERS,	p. 100
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See also FRAUD, 6—LIBEL.

I. FOR ILLEGAL ACTS.

1. Pending an action relating to a forfeited estate, one of the parties seized and conveyed the other to his own house by force; this amounts to battery, and may be sued on under the Act 1594, c. 219, after the original action has been determined, and notwithstanding a subsequent statute of indemnity. — *Robertson v. Robertson, Robert.* 55 (1712); *Aff. M.* 6828.

2. In an action of spuilzie objections to the relevancy must be first determined. In proving restitution of the goods one of the party by whose leader the spuilzie was committed is admissible as a witness. *Semble*, that a military officer acting under general orders from a superior officer may be liable for spuilzie. — *Munro v. Mackenzie, Robert.* 477 (1724); *Alt.*

3. Persons present with a band of marauders, though not proved to have personally committed damage, are liable for the amount of the damage committed by the band, which may be proved by the oath *in litem* of the owners. — *Mackenzie v. Mackilligin, Robert*. 431 (1723); *Aff.*

4. An action against the burgh under the Stat. 1 Geo. I. c. 5, is properly brought against the Magistrates and Town Council. Question, whether the removal of property forms a ground of damages against the burgh. — *Stratton v. Mags. of Montrose, Cr. & St.* 369 (1744); *Alt.*

5. Damages may be given conjunctly and severally against parties engaged in committing an assault, and evidence of prior assaults is admissible to prove malice and premeditation. — *Macdonall v. Macdonald, 2 Dow*, 66 (1813); *Aff.*

6. Damages are due for a severe blow on the head with a bar of iron, though the party struck had first given a slight blow on the shoulder with the fist. — *Dowie v. Douglas*, 1 *S. Ap.* 125 (1822); *Aff. F. C.* 30th May 1817.

7. A party charged on a horning, on which arrestment and caption are both used, is not entitled to damages for illegal arrest on the ground that he had offered part payment on condition of the charger passing from a disputed item, or that two days before the apprehension the same had been consigned and the arrestment loosed, this fact not being proved to have been known to the charger. Query, If it were material? — *Cooper v. Campbell*, 1 *W. & S.* 131 (1825); *Aff. 2 S.* 335.

See ACTION, 87—PARTNERSHIP, 24, 43—MED. FUG. 1—SUPERIOR AND VASSAL, 4.

SEDUCTION.—See ACTION, 104—HUSBAND AND WIFE, 33.

II. ACCIDENTS.

8. Children held entitled to damages for the death of their father through falling into an unfenced coal-pit within four feet of the high road. — *Cadell v. Black*, 5 *P.* 567 (1812); *Aff. M.* 13905.

9. A party making an opening for the purpose of his work in or leading from a highway is not answerable for accidents thereby occasioned when he has ceased, although temporarily, to use it for that purpose, and while it is being used for purposes over which he has no control. — *Milne v. Smith*, 2 *Dow*, 390 (1814); *Rev. F. C.* 8th March 1810.

10. A common stair may be considered as a highway to the extent of supporting an action for damages on account of an accident suffered through passing from it into an unfenced opening. — *Milne v. Smith*, 2 *Dow*, 390 (1814); *Rev. F. C.* 8th March 1810.

11. In a claim for damages for injury done by a dog, evidence is

necessary that the owner was guilty of negligence, and observed that to establish this in England it is necessary to prove that the owner knew the dog to be of savage habits, but that such previous knowledge is perhaps not essential in Scotland. The owner is not liable if he keeps the dog properly secured, and another person looses him, and incites him to mischief. — *Fleeming v. Orr*, 2 M'Q. 14 (1855); *Rev.* 15 D. 466.

12. A son is bound to support his mother, and therefore the mother has a title to sue for damages for his death by an accident. — *Weems v. Mathieson*, 4 M'Q. 215 (1861); *Aff.*

See LANDLORD AND TENANT, 6, 8—MASTER AND SERVANT.

III. LIABILITY OF PUBLIC OFFICERS.

13. Thread seized under 28 Geo. III. c. 17, by the Procurator-Fiscal as illegally manufactured ordered to be restored, reserving question of damages in respect of the seizure. — *Meek v. Mitchell*, 6 P. 420 (1819); *Aff.* F.C. 29th May 1818.

14. An action for malicious prosecution will not lie unless there was absence of probable cause. It will not lie against a Procurator-Fiscal where he only acted as private agent, and officially gave concurrence only. — *Arbuckle v. Taylor*, 3 Dow, 160 (1815); *Rem.* *See* 16.

15. Action is competent against one for instigating and abetting another to do an unlawful action without calling the party instigated as defender. But a public officer, holding a gratuitous office, and acting *bona fide* in supposed discharge of his duty, is not liable in damages to a party injured thereby. — *Watt v. Blair*, 1 S. Ap. 48 (1821); *Rev.*

16. An obligation by private parties to pay the expenses of a prosecution instituted by the Procurator-Fiscal to try the legality of a certain manufacture is valid, and entitles the Procurator-Fiscal to relief from actions of damages brought against him on account of the prosecution, at least up to the date at which it was disclaimed by the parties, and to a share in the expenses and damages *pro rata*, according to his own pecuniary interest in the penalties. — *Coopers v. Kerr*, 1 W. & S. 232 (1825); *Aff.* 2 S. 419.

17. Commissioners of Police being liable to be sued, through their clerk, for anything done or ordered by them in virtue of the Police Act, are not liable to be so sued for misconduct on the part of one of the constables. Neither is the Superintendent of Police liable to be so sued for the purpose of making the Commissioners liable. — *Thomson v. Mitchell*, 1 Robin. 162 (1840); *Rev.* 16 S. 409.

18. Road trustees are not liable for damages for injury caused to parties using the road in consequence of the negligence of workmen in executing operations on it within the powers of the trustees. Such a question, being one of law, appearing on the defences, ought to have

been decided before sending the case to a jury. — *Duncan v. Findlater*, *M'L. & R.* 912 ; 6 *Cl. & Fin.* 894 (1839) ; *Rev.* 16 *S.* 1150.

19. Action for damages lies against the members of a church court if they refuse to perform ministerial duties. — *Ferguson v. Earl of Kin-noul*, 1 *S. Bell*, 662 ; 9 *Cl. & Fin.* 251 (1842) ; *Aff.* 3 *D.* 778.

See CAUTIONER, 16, 17, 18—JUSTICE OF PEACE, 4, 7—WRONGOUS IMPR., 1.

DEATHBED.

1. Two out of four heirs-portioners having granted renunciation of a right to challenge a future settlement, *ex capite lecti*, the renunciation stipulating for certain conditions in favour of those who might sign it, in the event of its not being signed by all the four, but these conditions having been reduced as invalid by the two who did not sign, the renunciation is not binding on the two who did. — *Murray v. Kinloch*, *Cr. & St.* 245 (1739) ; *Aff.*

2. Bonds of provision to children executed on deathbed, in virtue of a reserved power to burden, *etiam in articulo mortis*, contained in the marriage-contract, are not reducible *ex capite lecti*. — *Forbes v. Forbes*, 2 *P.* 8 (1756) ; *Rev. M.* 3277.

3. In a disposition granted the heir-at-law, a reserved power to burden at any time during the granter's life warrants a burden created on deathbed, at least against the heir taking under the disposition. — *Pringle v. Pringle*, 2 *P.* 130 (1767) ; *Rev. M.* 3287.

4. A conveyance of an heritable debt, by a father as a provision to a younger son, in fulfilment of an instruction long before given to his agent, but the conveyance being in England, and actually executed on deathbed, and signed by only one notary, none other being procurable at the place, is reducible both on the head of deathbed and of being improbable. — *Douglas v. Earl of Morton*, 3 *P.* 671 (1773) ; *Aff.*

5. Heirs cannot object deathbed to a deed of succession, unless they were called by the last feudal investiture or destination. — *Duke of Hamilton v. Douglas*, 2 *P.* 449 (1779) ; *Aff. M.* 4356.

6. In deathbed, the day of executing the deeds is to be counted as indivisible, and the sixty days accordingly commence to run from midnight of that day, but as the last day of them will also be considered indivisible, death after the commencement of the sixtieth day will be considered as beyond the sixty days. — *Mercer v. Ogilvie*, 3 *P.* 434 (1796) ; *Aff. M.* 3336.

7. A gradual decline of health consequent on an accident, constitutes sickness under the statute. — *Mercer v. Ogilvie*, 3 *P.* 434 (1796) ; *Aff. M.* 3336. See 17.

8. A reservation, in a deed conveying land to a stranger, of a power

to alter, even on deathbed, extends only to affect the donee, and does not entitle the donor to affect the heir's right to reduce a disposition to another party on deathbed. The heir, though he takes the benefit of a revocation on deathbed, is not bound to approve the new disposition. Opinion by Lord Loughborough, that there is no ground for distinction between express and implied revocation on deathbed, such as was decided in *Rowan v. Alexander*, M. 11371. Opinion also that the law of deathbed is a rule of great excellence. See 17. — *Crauford v. Coutts*, 4 P. 100 (1799); Rev. M. 14958. See final declaration of House in M. 14963.

9. An owner of land having by *mortis causa* deed settled it on one not the heir, reserving power to alter and revoke even on deathbed, and having on deathbed revoked it, excepting as to the clause giving power to revoke, and disposed to another, the donee under the first deed is effectually excluded, but the heir of provision under the former investitures is entitled to reduce the second deed, and at the same time take the benefit of the revocation of the first which it contains. A sale on deathbed, not completed by acceptance of the purchaser before the seller's death, also operates as a revocation of a prior settlement, but is reducible by the heir. *Rowan v. Alexander*, M. 11371, and 2 Hailes 659, was wrongly decided, but cannot now be disturbed. — *Crauford v. Coutts*, 5 P. 73; 2 Bligh, 655 (1806); Rev. See 8, 14, 15.

10. By revocable deed in *liege poustie*, heritable property was conveyed to trustees to pay debts and legacies, and to be conveyed, as to the residue, to such persons as might be appointed by the settler in writing, and by deed of direction on deathbed he directed the trustees to sell the whole real estate and pay the proceeds as he there directed; held that the heir-at-law was entitled to reduce the deathbed deed as to the heritage. — *Wauchope v. Ker*, 5 P. 559 (1812); Aff. See 18.

11. A minute of sale having been abandoned by the parties, and the purpose it was intended to serve having been effected by a disposition, but which was executed on deathbed, it is reducible by the heir. — *Ranken v. Campbell*, 5 P. 573 (1812); Aff. M. Deathbed, Ap. No. 5.

12. Where a party who had executed in *liege poustie* a bond of provision, executed a new one on deathbed different only in respect of the time allowed for payment, and directed the first to be cancelled, remit to take the evidence of the person who had cancelled it, and of others, for the purpose of ascertaining the true intent of the act. — *Mure v. Mure*, 6 P. 399 (1818); Rev. F. C. 1st June 1813.

13. By deathbed deed the real and personal estates were directed to be sold and the proceeds to be invested, the interest to be paid to the heir-at-law for life, and after his death the fee to be paid to other parties. The heir-at-law reduced the deed as to the land; held that

he could not claim a life interest in the personal estate either under the deed, or as next of kin, and observed that the personal estate might be paid to the party entitled in fee, without waiting for the heir-at-law's death. — *Ker v. Wauchope*, 1 Bligh, 1 (1819); *Aff.*

14. A deathbed deed altering, but not expressly revoking, a prior deed, does not admit the heir of investiture whom the prior deed had excluded. The heir is not entitled to the benefit of a clause of redemption in reconveyance, subsequently revoked as to the lands in question. — *Duke of Roxburghe v. Wauchope*, 6 P. 548; 2 Bligh, 619 (1820); *Aff.*

15. A revocation on deathbed of a deed containing a power so to revoke, is effectual although the deed containing the revocation is void in its other effects *ex capite lecti*, and the heir of line may found on the revocation while reducing the dispositive part of the deed. Question, whether the plea of deathbed would be excluded if the deed were a mere repetition of the prior deed which it revokes. — *Cunningham v. Whiteford*, M. 16199 (commented on); *Mudie v. Moir*, 2 S. Ap. 9 (1824); *Aff.* F. C. 2d March 1820.

16. An heir of line excluded by a tailzie has a title to sue a reduction of a trust-deed by which it is burdened, and of a deed of nomination alleged to have been executed on deathbed, the three deeds forming together the settlement of the estate. — *Earl of Strathmore v. Strathmore Trs.*, 5 W. & S. 170 (1831); *Rev.* 8 S. 530.

17. A deed is not reducible on this head if the disease of which the party died, however soon after the execution, was not contracted at that time, although the habits of the party at that time might render the disease, when taken, more serious. (Per Lord Brougham)—The law of deathbed is a material part of the law of Scotland, and one so wholesome and judicious that it is of great importance it should be well understood. — *Mackay v. Davidson*, 5 W. & S. 210 (1831); *Aff.* 6 S. 367. *See* 7, 8, 19.

18. A *mortis causa* deed having directed the trustees to pay the residue to such person as might be named in a writing under the settler's hand, and in default of such writing to his next of kin, the heir cannot challenge such writing on the head of deathbed, being already excluded by the deed. — *Ker v. Vaughan*, 5 W. & S. 718 (1831); *Aff.* 8 S. 694. *See* 10.

19. A son executed a *mortis causa* disposition of his whole estate, "in the event of my predeceasing my parents without leaving lawful heirs of my body," to his parents and the longest liver, and after the death of the longest liver to such persons as he might name by any deed even on deathbed; and in case of dying without executing such deed, then to such persons as should be nominated by his parents. Held (1.) that a subsequent disposition of all property which might be

long to them at their death, made by the parents in the lifetime of the son, who survived them, took no effect. (2.) That the heir-at-law of the son, not being excluded by an effectual disposition to another, was entitled to reduce a deed nominating heirs made by the son on deathbed. Observations by Lord Brougham on the great benefit of the law of deathbed. — *Clyne's Trs. v. Clyne*, M'L. & R. 72; 6 Cl. & Fin. 539 (1839); Aff. 15 S. 911. See 8, 19.

20. Under a power in an entail to revoke or alter on deathbed, the whole of the fetters may be revoked, and the destination will remain effectual. — *Miller v. Marsh*, 2 M'Q. 284 (1855); Aff. 15 D. 823.

See ACTION, 28—HEIR, 4, 18—MINOR, 8.

DEBT.

I. DISCHARGE, p. 104	III. INDEFINITE PAYMENT, p. 105
II. PRESUMPTION OF PAYMENT, 104	IV. COMPENSATION, . . . 106

See also BOND—SECURITY—INTEREST.

I. DISCHARGE.

1. A general discharge having been executed between partners of all vouchers by or to each other, whether as individuals or partners, it does not apply to a bond by one partner to another for a private debt, unless the bond is proved to have been intended to be included in the discharge. — *Craufurd v. M'Cormick*, 2 W. & S. 569 (1827); Aff.

2. A written receipt (by a minor, but the case seemed not to turn upon the minority) is not conclusive, and without a reduction an inquiry may be ordered how much of the sum contained in the receipt was actually received, or might have been received without wilful default. — *Craufurd v. Bennet*, 2 W. & S. 608 (1827); Rev.

3. A general discharge of debts due before a certain day does not discharge a debt arising from a cautionary obligation which subsisted before that day, but in respect of which no demand arose, or payment was made, till after it. — *M'Taggart v. Jeffrey*, 4 W. & S. 361 (1830); Rev. 6 S. 641.

See FRAUD, 1, 2—STAMP, 3, 4.

II. PRESUMPTION OF PAYMENT.

4. A bill on an agent of the drawer is not presumed to have been paid without proof of payment, although there appears to have been funds in the agent's hands at the time, and no demand made on the bill for nineteen years. A receipt between officers of a regiment is valid, though neither holograph nor tested. — *Lady Sempill v. Murray, Robert*. 282 (1720); Rev. M. 16921.

5. There is no presumption of payment of an annuity due by bond, though not sued upon for forty-four years after its date (including eleven years of minority), and nineteen years after the last payment became due. — *Comrs. of Forf. Estates v. Lockhart, Robert*. 514 (1725); *Aff.*

6. The principal and cautioner being both dead, the fact of the receipt for payment of the debt having been granted to the cautioner held to imply a presumption that he had paid it, though the principal had always paid the interest, the bond was found cancelled in his repositories, and ten years had elapsed without claim by the cautioner's representatives. — *Cullar v. Maxwell, Cr. & St.* 58 (1731); *Rev.*

7. Special circumstances, coupled with delay of fifty years, held to extinguish a right of action on an acknowledgment of debt. — *Campbell v. Halkett, Cr. & St.* 427 (1749); *Aff. M.* 11634.

8. Remission of penalties of a debt due to and adjudged by a trust, being allowed by the factor, are to be presumed to have been authorised by the trustees, if not challenged for twenty-five years. Circumstances which were held to confirm the presumption. — *Douglas v. Murray, 4 P.* 4 (1797); *Rev.*

9. When property belonging to a son, as coming from his mother, is sold, and the price received by the father, it remains a debt against his estate at his death, however long afterwards, unless there is positive evidence that the son has discharged his claim. — *Lashley v. Hog, 4 P.* 581 (1804); *Alt.*

See BANKRUPTCY, 73.—TRUST, 52.

III. INDEFINITE PAYMENT.

10. An indefinite payment by a debtor may be ascribed by him subsequently to either of two obligations, which otherwise would be prescribed, and will not interrupt prescription in favour of both. — *Garden v. Rigg, Cr. & St.* 409 (1748); *Aff. M.* 11274.

11. A law agent in Edinburgh having several accounts due to him by a country agent, and having required payment of one in particular, and a sum having been in answer sent him to account; held that it was to be imputed to that particular account, and so far relieved the client from his joint liability. — *Mitchell v. Cullen, 1 M'Q.* 190; *1 Stu.* 718 (1852); *Rev.*

12. Although an indefinite payment may be imputed to interest rather than to principal in the creditor's option, yet when such payment is made under an agreement that 20s. in the pound should be accepted in full of all debts, with interest up to a certain date, it cannot be imputed in payment of subsequent interest. — *Scott v. Sandeman, 1 M'Q.* 293; *1 Stu.* 882 (1852); *Rev.* *11 D.* 405.

IV. COMPENSATION.

13. Circumstances in which certain debts were held to be included in mutual settlement and discharge, and not afterwards pleadable in compensation. — *Hill v. Grant*, Cr. & St. 597 (1755); *Rev. M.* 2661.

14. A moveable debt due by a husband cannot be set off in compensation against a heritable debt due to his wife. — *Sinclair v. Young*, 3 P. 64; *Aff. M.* 5545.

15. Compensation is only competent when the debt is liquid, or capable of immediate liquidation. — *Downe v. Pitcairn*, 3 W. & S. 472; 4 *Bligh*, N.S. 550 (1829); *Aff. 2 S.* 658.

See ASSIGNATION, 5—BANK, 5, 7—BANKRUPTCY, 44, 48, 49—WILL.

DEED.

I. SUBSCRIPTION, . . . p. 106	III. ERASURES, . . . p. 108
II. TESTING CLAUSE, . . . 107	IV. DELIVERY, . . . 109

See also WILL—WRITTEN DOCUMENT.

I. SUBSCRIPTION.

1. A dying man having, in signing his will, written half his name without assistance, but been unable to complete it, and his hand having been guided in finishing, the subscription is invalid. — *Moniepenne v. Brown*, Robert. 26 (1711); *Aff. M.* 15936.

2. Deeds executed by a blind and deaf man by means of notaries are void, if it appear that they were not read over to him in such a way as that he could distinctly understand them. — *Aglionby v. Maxwell*, 3 P. 365 (1794); *Aff. M.* 16853.

3. A deed signed by a blind man in presence of two witnesses is probative, although not read over to him before signing, and can be reduced only on proof (the burden of which lies on the pursuer of the reduction) that he did not know the contents of the deed, the true question in issue being whether the deed was his deed, in regard to which, the not reading over is admissible, but not conclusive evidence against the deed; and the subsequent execution of a deed of alteration of the first is admissible evidence in support of the averment that he knew its contents. — *Duff v. Earl of Fife*, 1 S. Ap. 498 (1823); *Rev. F. C.* 30th Nov. 1819.

4. A party so far blind as to be unable to read, but able to see that he had subscribed, may subscribe either by his own hand or by notaries, and if in the latter form, it is sufficient if the document state that from defect of sight he cannot see to read writing distinctly. — *Reid v. Baxter*, 1 Robin. 66; 7 Cl. & Fin. 261 (1840); *Aff. 16 S.* 994.

5. An assignation written on two pages, signed only on the last, but with a forged signature on the first, held valid, it not having been proved that the assignees had been guilty of the forgery. — *Scott v. Cochran*, 6 P. 719 (1759); *Aff.*

6. When a deed is contained in one sheet, signature on the last page is sufficient. A statement by the subscribing witnesses that they “do not recollect” seeing the party subscribe or acknowledge his signature will not suffice to invalidate the deed. Query, whether if they positively deponed that they had not seen the execution, it would infer nullity of the deed, or only the statutory penalty against themselves. — *Smith v. Bank of Scotland*, 2 S. Ap. 265; 1 Dow, 272 (1813); *Aff.*

7. Attesting witnesses may be called to prove that they were not present, nor heard the granter acknowledge his subscription. The witnesses need not sign in presence of the granter on his acknowledging his subscription. The grantee of a bond of annuity executed of even date with a deed challenged, held inadmissible as witness. — *Frank v. Frank*, 5 P. 278 (1809); *Aff. M.* 16824.

8. A probative deed may be reduced, if it be proved that it was not signed in the presence of one of the attesting witnesses, nor the signature explicitly acknowledged in words or by equipollents to the witness before his subscription, and the attesting witnesses are admissible to prove that the execution was not in their presence, or acknowledged. — *Duff v. Earl of Fife*, 2 W. & S. 166 (1826); *Aff.* 4 S. 335.

See DEATHBED, 4—LAW AGENT, 8—PERSONAL CAPACITY.

II. TESTING CLAUSE.

9. The designation of the writer of a deed as “gentleman” is sufficient. — *Lady Sempill v. Murray*, Robert. 282 (1720).

10. Where both witnesses were servants to the granter, but only one was so designated, the other being undesignated, the deed is invalid. — *Carre v. Haldane*, Cr. & St. 51 (1731); *Aff. M.* 16924.

11. The designation of witnesses in the body of the deed is suppliable by the subscription of the several parties, by lapse of time and other adminicles, in deeds prior to the Act 1681, and a condescendence is unnecessary. — *Lord Advocate v. Urquhart*, Cr. & St. 586 (1755); *Rev. M.* 16903.

12. The omission to notice marginal notes in the testing clause may be remedied by proof of their having been added before signature. — *Bruce v. Bruce*, 2 P. 258 (1772); *Alt. M.* 10805.

13. A testing clause which names and designs the witnesses, but without stating that they are witnesses, each of them, however, having added the word “witness” after his subscription, is valid. — *Wemyss v. Hay*, 1 W. & S. 140 (1825); *Aff.* 1 S. 47.

14. An imperfect testing clause as regards one party to the deed does not make it void, as against another party whose subscription is correctly stated; and even as to the party whose subscription is incorrectly stated, the defect may be cured by *rei interventus*. — *Kibbles v. Stevenson*, 5 W. & S. 553 (1831); Aff. 9 S. 233.

15. A bond of annuity of which the testing clause was improbable, through an error in the Christian name of one of the witnesses, held to be effectual *rei interventu* against one of the parties subscribing, through whom the consideration, and several terms of the annuity, had been paid, though he was only the law agent of the party for whose behoof the money was advanced, and took no benefit by it himself. — *Hamilton v. Wright*, 3 S. & M'L. 127 (1838); Aff. 14 S. 323.

16. Within six months after a deed has been given in to be registered, but before it has actually been recorded, it is competent to correct, by an addition to the testing clause, an error which had been made in the name of one of the witnesses. — *Cunninghame v. M'Leod*, 5 S. Bell, 210 (1840); Aff. 3 D. 1288.

See GUARANTEE, 3—HEIR, 44, 45—INFECTMENT.

III. ERASURES.

17. Deletions and marginal notes signed by the grantor of a conveyance of patronage, but not noticed in the testing clause, do not give the presbytery a right of objecting. Semble that they do not annul the deed. — *Cuming v. Presbytery of Aberdeen*, Robert. 364 (1721); Aff.

18. The word "pounds" being written on an erasure, while the penalty was stated in merks proportionate to the sum, had merks been written instead of pounds, annuls a bond, although it had been, in a prior action thirty years before, decreed to be compensated, but, as was alleged, without having been produced in Court. — *Kennedy v. Macdowal*, Robert. 488 (1724); Aff. M. 17063.

19. It is not a fatal erasure, in a deed of entail, that after the words "heir male" in the destination several words are erased, and the word "whatsoever" written on the erasure. — *Maxwell v. Houston*, Robert. 539 (1725); Aff. See 26, and Entail, 88.

20. A vitiated date in a disposition cannot be supported by parole evidence, even where a material part of the date is unvitiated. — *Howie v. Merry*, 3 P. 101 (1806); Aff. M. Writ, Ap. No. 3.

21. The date of execution of a deed being stated as the 24th April, the word fourth being written on erasure, it is not a vitiation *in essentialibus*. — *Hotchkin v. Dickson*, 6 P. 615; 2 Bligh, 303 (1820); Aff.

22. The fact of the name of an attesting witness being written on an erasure vitiates the deed, though the witness depones that he has no doubt it is his handwriting, and that he has no doubt he would not

sign as witness unless he saw the deed duly executed, but has no special recollection of the particular deed. — *Walker v. Gibson*, 2 Dow, 270 (1814); Aff. F. C. 16th June 1809. See 6, 24.

23. Erasures in a deed executed in duplicate, and expressed in the testing clause of both duplicates to be so executed, do not vitiate the deed, though not noticed in the testing clause, if the words written on erasure in one duplicate are properly written in the other. — *Earl of Strathmore v. Paul*, 1 Robin. 189 (1840); Aff. 15 S. 449.

24. The letters "ohn" of the word John, the Christian name of the donee, being written on erasure throughout, except in the testing clause, the deed is void. Evidence of the writer and subscribing witnesses is inadmissible to prove that writing on erasures was made before subscription, and that the testing clause was filled up in presence of the subscriber. Observations on the facility afforded to fraud by the practice of filling up testing clauses, containing notice of erasures, &c., unless the subscriber indicates his knowledge that the testing clause was so filled up — *Kedder v. Reid*, 1 Robin. 183 (1840); Aff. 12 S. 681, and 13 S. 619.

25. When there is no evidence on the face of the deed that an erasure *in substantialibus* was made before execution, neither the words erased can be restored, nor the words written on the erasure supported by evidence, or by comparison with other parts of the deed, and all that has dependence upon them is void. A deed being thus void cannot be set up by homologation, or by either the positive or negative prescription. — *Grant v. Shepherd*, 6 S. Bell, 153 (1847); Aff. 6 D. 464.

26. In the irritancy of the deeds of the institute, "*or of any of the said heirs*," the words in italics being written on erasure, do not invalidate the deed, it being capable of being read without them, while it is not admissible to supply in their place imaginary words as those which were erased. — *Gollan v. Gollan*, 4 M'Q. 585 (1863); Aff. 24 D. 1410. See 19.

See BANKRUPTCY, 17—INFECTMENT, 10, 11, 12.

IV. DELIVERY.

27. A deed not dispensing with delivery, and found in the hands of an advocate who was the usual legal adviser of the granter, is undelivered. — *Drummond v. Lord Advocate*, Cr. & St. 503 (1751); Aff. M. 4875.

28. A bond of provision by a brother to his sisters, being in satisfaction of former bonds and in full of legitim, though not having a clause dispensing with delivery, is presumed delivered on being found in their possession. — *Maitland v. Gordon*, 2 P. 43 (1760); Aff. M. 11161.

29. A gratuitous bond of annuity by one brother to another, framed to take effect immediately, found in the hands of the granter's regular agent, who also acted occasionally as agent for the granter, though it

was not proved that he was his paid agent, held delivered. The annuity had been regularly paid for a number of years from the date of the bond, but had then been stopped by orders of the granter. — *Maule v. Ramsay*, 4 W. & S. 58 (1830); Aff. 6 S. 343.

30. A trust-deed though not delivered, nor containing a clause dispensing with delivery, but reserving the truster's liferent, held *mortis causa*, and valid without delivery. — *Brack v. Johnston*, 5 W. & S. 61 (1831); Aff. 6 S. 111.

See EVIDENCE, 1—GUARANTEE, 1, 4—HEIR, 39—HUSBAND AND WIFE, 37—MULTIPLEPOINDING, 1.

DILIGENCE.

1. Diligence may proceed, on an agreement with a clause of registration,—(1.) for an account; (2.) for production of books; (3.) for payment of a sum or penalty. — *Baird v. Neilson*, 1 S. Bell, 219 (1842); Aff.

2. Formal objections repelled. — *Cleland v. Clason*, 7 S. Bell, 153 (1850); Aff. 11 D. 601.

See ADJUDICATION—ARRESTMENT—BANKRUPTCY, 17—DAMAGES—INHIBITION—SHERIFF, 5.

DISSENTERS.

1. The Magistrates and Court of Session were not entitled to enforce by imprisonment an act of the Presbytery forbidding a clergyman of the Episcopal Church from exercising the ministry within their bounds. — *Greenshields v. Mags. of Edinburgh*, Robert. 12; Colles, 427 (1711); Rev. 4 Br. Sup. 774.

2. On a difference of opinion occurring in a body of dissenters leading to a secession of part of the body, the property held in trust for the several congregations remains with that portion which adheres to the established government of the body, unless the seceders can establish that that portion has departed essentially from the original principles of the body. — *Craigdallie v. Aikman*, 5 P. 719; 1 Dow, 1; 6 P. 618; 2 Bligh, 529 (1820); Aff.

3. A member of a congregation who has during three years acquiesced in the transfer of the church, &c., to another religious body, cannot sue to set it aside. — *Cairncross v. Lorimer*, 3 M'Q. 827 (1860); Aff. 20 D. 997.

DOMICILE.

1. A merchant pursuing his business abroad as his residence, loses his domicile of origin, though he may intend to return to it when he

has made his fortune, and he does not recover it by being in process of transmitting his fortune to it, not having as yet personally changed his residence. — *Bruce v. Bruce*, 3 P. 163 (1790); *Alt. M.* 4617.

2. A Scotsman entering the navy at twelve, continuing in it for seven years; then in the Dutch service for several years; again in the British navy for nine years; in the Russian for three; then for twenty years until his death in the British, having the residence of his wife and family at Gosport, but occasionally visiting Scotland, boarding his children there, and dying there, and having some house property there, held to be a domiciled Englishman. — *Ommaney v. Bingham*, 3 P. 448 (1796); *Rev.*

3. A Scottish peer having all his estates in Scotland, and which was the place of his residence for the greater part of the year, though residing in London during the sitting of Parliament, and dying there, held domiciled in Scotland. — *Ker v. Wauchope (Duke of Roxburgh)*, 1 *Bligh*, 1; *Aff.*

4. Where the domicile has been lost, jurisdiction *ratione originis* cannot be sustained. — *Grant v. Pedie*, 1 W. & S. 716 (1825); *Rev.* 1 S. 495.

5. A Scotsman by birth, and owner of estates in Scotland, but residing and carrying on business in London for fifty years, does not lose the domicile thus acquired, by returning to Scotland for a few weeks occasionally *sine animo remanendi*. — *Rose v. Ross*, 4 W. & S. 289; 6 *Bligh*, N.S. 468 (1830); *Rev.* 5 S. 605.

6. The owner of estates in Scotland, and born and educated there, and residing there during the greater part of the year, does not lose his Scottish domicile by holding office in the Government and attending parliamentary duties in London. — *Warrender v. Warrender*, 2 S. & M'L. 154; 9 *Bligh*, N.S. 89; 2 *Cl. & Fin.* 488 (1835); *Aff.* 2 S. 847.

7. A Scotsman by birth, and owner of estates in Scotland, on which from time to time he resided, does not lose his domicile by residing for several years in London without any regular occupation there. — *Munro v. Munro*, 1 *Robin.* 492; 7 *Cl. & Fin.* 844 (1840); *Aff.* 16 S. 18.

8. The domicile of origin must prevail till the party has not only acquired another, but has executed his intention of abandoning the first. — *Munro v. Munro*, 1 *Robin.* 492 (1840); *Rev.* 16 S. 18.

9. Domicile of origin in Scotland held retained by an heir of entail, who always expressed his intention ultimately to return and settle in it, and did reside in it from time to time for considerable periods, although the greater part of his life was spent in other places, and at sea, but not in any settled avocation. Consequent legitimation, by subsequent marriage, of children born in England before marriage. — *Aikman v. Aikman*, 3 M'Q. 854 (1860); *Aff.* 21 D. 757.

10. Domicile acquired in England, held retained by retention of a place of residence in it, and performing the duties of magistrate, although the principal residence had latterly been in Scotland, the country of origin. It is competent to examine the party whose domicile is in question, as to the intention with which he changed his residence. — *Maxwell v. M'Clure*, 3 M'Q. 852 (1860); *Aff.* 20 D. 307.

11. A domiciled Englishman resorting to Scotland to avoid his creditors, and taking a house there on a six years' lease, but with liberty to sublet, held not to have lost his English domicile after an actual residence of four years without returning to England, there being some evidence of an intention to return if his debts were paid. — *Pitt v. Pitt*, 4 M'Q. 627 (1864).

See HUSBAND AND WIFE, 30, 60, 79–83.

ENTAIL.

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I. WHO MAY EXECUTE.

1. A destination in a marriage-contract to the heirs of the marriage precludes a subsequent entail calling the heirs male before the heir of line of the marriage. — *Stewart v. Graham* (Phisgill), Cr. & St. 365 (1744); *Aff. Elchies v. Mutual Contr.*, No. 20.

2. A marriage-contract, in which the father binds himself to convey his estate to himself and the heirs male of the marriage, does not prevent him from executing an entail in favour of the heirs male of the marriage, with substitutions of his own heirs female before the heirs whatsoever of his eldest son. — *Craik v. Craik* (Duchrae), Cr. & St. 542 (1753); *Aff. M.* 12984.

3. A power of redemption being reserved to the maker of an entail entitling him to redeem the lands from the entail on payment of a gold noble, he does not need, after using the redemption, to make up titles again in his own person before executing a new entail. — Lord Advo-

cate *v.* Bayne (not reported), Lord's Journals, 10th April 1759, and Appeal Cases.

4. An entail executed by a party having only a personal title to the lands is effectual against purchasers. — Lord Napier *v.* Livingstone (West Quarter), 2 P. 108 (1765); Aff. M. 15409, 15418.

5. A tailzie, binding the heirs to redeem adjudications for the entailer's debt, which debt was contracted *contra fidem* of a marriage-contract, by which the entailer had previously conveyed the estate free of debt to himself and the heirs of the marriage, with power to limit the said heirs with such irritant and resolute clauses as he should think proper, is void. — Fleming *v.* Fleming (Barochan), 2 P. 588 (1782); Aff. .

6. A post-nuptial unilateral deed, whereby the husband conveys his estate to his wife in liferent and his heirs of his body in fee, has not the effect of a marriage-contract to give his heirs a *jus crediti* entitling them to challenge a subsequent entail. — Sinclair *v.* Threipland (South-dun), 3 P. 113 (1789); Rev.

7. The husband of an heiress was by contract of marriage made a creditor on the estate for the purpose of enabling him to raise adjudication and obtain a title, there being prior adjudications completed by declarator of expiry of the legal, infestment and possession, and the husband afterwards by disposition, first directly to the wife and then to a trustee to lead adjudication, conveyed the estate to himself and wife in conjunct fee and liferent, and to the heirs of the marriage in fee, whom failing to the wife and her heirs, and afterwards obtained right to the first adjudication and charter of adjudication, both taken to himself and his heirs and assignees, and thereon executed a strict entail of the estate to himself and wife in liferent, and the heirs of his body in fee, and finally to his own heirs whatsoever; held that the entail was valid. — Henderson *v.* Henderson (Earlshall); 3 P. 686 (1791); Aff. M. 4215.

8. An heir under an imperfect entail having ratified a second and strict entail, and possessed under it, and the debts of the original entailer having been cleared off as the consideration for the second entail, the son succeeding to the heir so ratifying and enrolling himself as freeholder thereunder, is barred *personali exceptione* from afterwards reducing the second entail, though within the *quadriennium utile*, and though alleging that his titles under it had been made up by trustees in his minority. — Cunninghame *v.* Cunninghame (Balgownie), 1 W. & S. 103 (1825); Aff. 2 S. 232.

9. Remit of consent to consider whether an entail was *ultra vires* of the entailer in respect of a prior marriage-contract. — Macpherson *v.* Macpherson (Cluny), 5 W. & S. 77 (1831); 5 S. 826.

10. A trust-disposition for behoof of creditors with power of sale, and on which the trustee is infeft, does not so divest the granter as to invalidate a subsequent deed of entail of the estate by him in the form of a procuratory. — *M'Millan v. Campbell* (Combie), 7 W. & S. 441 (1834); Aff. 9 S. 551. See Forfeiture, 9, 10—Outlaw.

11. An entail defective in some of the fetters was an effectual bar to the execution, prior to the Rutherfurd Act, of an entail containing new fetters, and may be reduced by an heir who has made up titles under it. — *Urquhart v. Urquhart* (Meldrum), 1 M'Q. 658 (1853); Aff. 13 D. 742.

12. An entail good *inter heredes*, but bad as to third parties, was formerly a bar to the execution of an entail valid in all respects, but it is now, under the Rutherfurd Act, bad as against all parties and (semble) without declarator. — *Cochrane v. Baillie* (Hyndshaw), 2 M'Q. 529 (1857); Aff. 17 D. 659; *Dempster v. Dempster* (Skibo), 3 M'Q. 62 (1857); Aff.

See 17; also HEIRS (*Destination*).

II. FORM OF.

13. A conveyance by resignation of the *dominium utile* to the superior does not bring it within the fetters of an entail of the superiority. — *Heron v. Duke of Queensberry* (Lochhouse), Cr. & St. 98 (1733); Aff.

14. An entailer having by a new deed reciting the previous entail disposed to a new series of heirs, without inserting the fetters, except by referring to them as in the former entail; held that the second deed, being followed by infeftment, was a new settlement of the estate, and not containing the fetters, nor having been recorded, was void against creditors or a purchaser. — *Paterson v. Bromfield* (Eccles), 3 P. 50 (1786); Aff. M. 15618; *Cuthbert v. Paterson* (same entail), 3 P. 76 (1787); Aff.

15. The clerical omission of the words "in favour of and for new infeftment," in a procuratory of resignation constituting an entail, is not fatal to the entail, the heir called having taken a charter on the procuratory. — *Munro v. Munro* (Fowlis), 3 W. & S. 344 (1818); Aff. 4 S. 467.

16. An entail having reserved power to nominate heirs, the power may be exercised by the entail of another estate declaring that the heirs whom it calls shall be the heirs of the first-mentioned entail. — *Stewart v. Porterfield* (Porterfield), 5 W. & S. 515 (1831); Aff. 8 S. 17.

17. A former entail being worked off by prescriptive possession on charter and sasine, held that the charter constituted a valid entail, although the fetters were not contained in the dispositive clause, but only in the *quæ quidem*, and held that words contracted there were to

be so read as to apply them to the heirs of the destination in the dispositive clause rather than to the heirs of the prior entail. — *Vere v. Hope* (Craigiehall), 2 S. & M'L. 817 (1837); Aff. 11 S. 520. See 25.

18. A strict tailzie contained power to revoke or alter; a subsequent deed by the same maker referred to such a tailzie, but without stating its date, and introduced new heirs and new conditions, and declared that they should take under the conditions, &c., in the entail referred to. Held that the two deeds together constituted an entail of the lands, and the Court might order a deed to be prepared and executed by the heirs embodying the two. — *Fraser v. Lord Lovat* (Abertarff), 1 S. Bell, 129 (1842); Aff. 3 S. 14, and 1 D. 887.

19. A valid entail may be made by a procuratory of resignation, with general assignation of writs, granted by one uninfert, and holding an unexecuted procuratory, and on such last-mentioned procuratory being used for infertment, the conditions of entail contained in the other may be engrossed in the sasine. — *Renton v. Anstruther* (Caiplie), 1 S. Bell, 129 (1842); 2 S. Bell, 214 (1843); Aff.

20. An entailer having, in exercise of a power to alter and revoke the entail, executed a deed which altered, though not expressly revoking it, the two together constitute the entail, and if the latter is not recorded, the entail is void. — *Earl of Mansfield v. Stewart* (Logiealmond), 5 S. Bell, 139 (1846); Aff.

21. Lands may be held to be included in an entail, though not expressly named, if it is clearly proved that at the time they were commonly known under the general designation of the estate entailed, or were possessed as parts and pertinents; but without such proof they will not be held to be included, although contiguous. — *Earl of Stair v. King* (Cults), 5 S. Bell, 82 (1846); Aff. 6 D. 821.

22. A subsequent entail under which the lands were held being materially different from a prior one, and not having been registered, is void. — *Inglis v. Inglis* (Halhill), 2 Stu. H. L. 81 (1853); Aff.

23. A deed executed under a reserved power in an entail to alter or revoke, but merely striking out one of the substitutes called, need not be recorded in the Register of Tailzies. — *Norton v. Stirling* (Renton), 2 M'Q. 205 (1855); Aff. 14 D. 944.

24. Trustees being directed to convey lands under all the conditions, provisions, &c., of an existing entail, "so as to form a valid and effectual entail according to the law of Scotland," but the model entail being afterwards found invalid; held that the entail to be executed was to be a good one, free from the defects which had avoided the model. — *Graham v. Stewart* (Lynedoch), 2 M'Q. 295 (1855); Aff. 15 D. 558. See 104.

25. An obligation to make an entail, followed in the same deed by a procuratory for resigning the lands in favour of the heirs named, and

under the conditions by reference of a prior entail, is invalid both as an entail and as a contract to make an entail, and the charter following containing the conditions at length is also invalid as an entail. Query, Whether the obligation, if it had not been followed by the attempt to perform it, would have fallen under the negative prescription. — *Cochrane v. Baillie* (Hyndshaw), 2 M'Q. 529 (1857); Aff. 17 D. 659.

26. A disposition of entail by a party uninfest, containing an assignation to an unexecuted procuratory, remains effectual, although the grantee subsequently makes up a title in fee simple on the procuratory, and is the original entail, not merely an obligation on the heirs to execute an entail. — *Earl of Fife v. Duff* (Carraldston), 4 M'Q. 469 (1863); Aff. 24 D. 936.

See DEATHBED, 16—DEED, 26—PROVING THE TENOR, 3—
TRUST, 22, 38.

III. DESCRIPTION OF HEIRS BOUND.

27. A tailzie made by procuratory in 1684, on which charter was granted in 1686, the tailzie not being recorded under the Act 1685, called first several series of male heirs, whom failing female heirs; then a prohibition against contracting debt was directed against the male heirs doing so, "in prejudice of the heirs female," it was followed by powers to provide jointures, and provisions for the succession of the eldest heir female without division, and for their husbands taking the name and arms, then by prohibitions against the heirs female contracting debts or doing deeds by which the lands might be evicted; "and if they shall happen to contravene, they shall *eo ipso* lose their right to said lands for all time following, and it shall be lawful to the next heir of tailzie to pursue declarator thereon, and enter into possession free from the burden of said debts and deeds; and in like manner they shall be declared to be of no effect, and null and void as against said estate, and the next heir may succeed to the same either as heir to the contravener or to the heir preceding who died last vested and seized in the lands, passing over the contravener." Held that the irritancy applied to heirs male, as well as heirs female, and that the entail was effectual against contraction of debt by a male heir immediately succeeding the maker of the tailzie. — *Falconar v. Mushet* (Riccarton), Robert. 110 (1714); Rev. *Craig's Crs. v. Craig's Crs.*, M. 15494.

28. Prohibitions directed against the heirs female of the first substitute (herself a female) or "any other of the heirs male, and of tailzie before mentioned (except the heirs male of the said" first substitute), held to be effectual against the first substitute herself. — *Nairn v. Nairn* (Strathord), Cr. & St. 192 (1736); Rev. *Elchies v. Tailzie*, No. 5.

29. A tailzie may be validly made which imposes the restrictions on

only one class of the heirs, called such as heirs female. — *Maitland v. Forbes* (Pitrichie), Cr. & St. 570 (1754) ; Aff. M. 14431.

30. The last substitute in the destination contained in a tailzie, preceding the heirs whomsoever, may convey the estate by *mortis causâ* deed, as if it were a fee simple. — *Earl of Ruglen v. Kennedy*, 2 P. 49 (1760) ; Aff.

31. An entail contained a destination to a series of substitutes named, and their heirs, and imposed the fetters on the institute by name, and “the substitutes before mentioned and described by name,” held that the heirs of the substitutes were equally bound. — *Dalrymple v. Hunter*, 6 P. 807 (1784) ; Aff.

32. Mutual tailzies being made by A. and B., A.’s declaring that it was made on condition that B. should execute a tailzie of his estate according to the same course of succession, but that if this were not done, any heir of tailzie of A. not succeeding to the estate of B. should be free from the fetters of the tailzie of A., and B.’s tailzie being not identical in the ultimate destination with A.’s, the latter is void at the instance of an heir in possession, even though he has also succeeded to B.’s estate under the first branch of the destination. — *Rocheid v. Kinloch* (Inverleith), 3 P. 152 (1790) ; Rev.

33. Though the fetters are introduced in the middle of the destination, and refer to “the heirs before mentioned,” they are valid against the heirs after mentioned. — *Ker v. Innes* (Roxburgh), 5 P. 362 (1810) ; Aff. M. Tailzie Ap. 1, No. 13.

34. A tailzie having, after granting the lands and setting forth the order of succession, declared that any of such heirs succeeding to another estate subject to a name and arms provision should be obliged to denude of the estate now granted in favour of the next heir under the “conditions, &c., contained in this present right, and with and under this provision, &c.,” and then setting forth proper prohibitory irritant and resolute clauses, held that these applied to the whole heirs called, and not merely to the heirs in whose favour a preceding heir might denude. — *Monro v. Monro* (Fowlis), 3 W. & S. 344 (1828) ; Aff. 4 S. 467.

35. A tailzie is not void on account of some of the substitutions being *ultra vires*, but may be sustained as to the other prior or posterior substitutions. — *Stewart v. Porterfield* (Porterfield), 5 W. & S. 515 (1831) ; Aff. 8 S. 17.

36. An entail, though it does not exclude heirs portioners, is effectual until the succession actually opens to such heirs. Special case in which an entail, comprehending two estates, was held effectual after they had passed to different series of heirs, and the restrictions upon heirs of tailzie were held applicable to heirs of the body of the entailer’s

daughters after failure of his heirs male. — *Mure v. Mure* (Livingstone), 3 S. & M'L. 237 (1838); Aff. 15 S. 581.

37. The heir whatsoever in the concluding destination of an entail is not an heir of entail, and has no title to sue the last heir of tailzie in possession for contravening, as he is, in fact, owner in fee simple. — *Colville v. Colville* (Crombie), 4 S. Bell 248 (1845); Aff. 5 D. 861.

38. A declarator of irritancy to the effect of resolving the rights of the descendants of a contravener cannot be brought after his death. Observations on Bargany case. — *Maxwell v. Maxwell* (Merksworth), 5 S. Bell 165 (1846); Aff. 6 D. 255.

39. A power to the heirs of entail "so often as their apparent or presumptive heirs are females, to settle the estate upon a younger daughter in preference to an elder daughter," enables a daughter succeeding to settle the estate upon an elder sister and her heirs, either by deed *mortis causa* or *inter vivos*. — *Martin v. Kelso* (Dankeith), 2 M'Q. 556 (1857); Aff. 15 D. 950.

See DEED, 19, 26—HEIRS (*Description of*).

IV. INSTITUTE.

40. The prohibitory, &c., clauses of a strict entail being directed against the "heirs of entail," they do not apply to the institute, who is "fiar, or disponee." — *Edmonstone v. Edmonstone* (Duntreath) 2 P. 255 (1771); Rev. M. 4409.

41. The fetters being laid only on the heirs of tailzie, and the heirs succeeding to the lands, the institute is unaffected by them, although he recognises the entail as a destination. A decree of declarator of freedom from the fetters alleged to have been obtained by collusion, not insisted in as *res judicata*. — *Marchioness of Titchfield v. Gordon* (Gordonston) 4 P. 157 (1800); Aff. M. 15467.

42. Under a power to nominate heirs in an entail, a nomination was made of A., whom failing, of B., &c., "as heirs of tailzie," but by a dispositive clause following, the estate was conveyed in liferent to the father of A., and in fee to A., &c.; held (on remit) that A. was institute and free from the fetters imposed on heirs. — *Menzies v. Beresford* (Culdares) 4 P. 242 (1801); and 5 Pat. 522 (1811); Aff.

43. The prohibitory and irritant clauses being duly directed against the institute by name, and the heirs, and the resolute applying to "the person or persons heirs of tailzie aforesaid," held that it applied to the institute. — *Syme v. Dickson* (Blairhall) 4 P. 471 (1803); M. 15473.

44. An entailer having settled personal and real estate, unentailed, on the institute, with directions that the proceeds should be laid out in land to be entailed, the institute is liable to account to the substitutes for all sums uplifted and not so applied within forty years before the

date of an action brought to that effect. Remit to consider whether the claim of the substitute as to sums received before is cut off by the negative prescription. — *Rocheid v. Kinloch* (Inverleith), 5 P. 35 (1805); Rem. F. C. 27th May 1800 and 1st March 1808.

45. Held, on a review of the whole deed, that the expression “my said heirs or members of tailzie,” did not apply to the institute. Observations on Duntreath case. — *Steel v. Steel* (Baldastard), 6 P. 322; 5 Dow 72 (1817); Aff. F. C. 12th May 1814.

46. The fetters of an entail being imposed on the institute and the heirs substitute, and the institute predeceasing the entailer, the substitute taking by virtue of the conveyance in the deed is bound by the whole conditions and restrictions of the entail. — *Mackenzie v. Mackenzie*, 1 S. Ap. 150 (1622); Aff. F. C. 24th Nov. 1818. See Titles.

47. Where the irritant and resolute clauses are run together and the institute is referred to by name in the irritant clause, but the resolute is directed against “each and every heir or person so contravening,” &c., the talzie is valid. — *Douglas v. Glassford* (Dougaltston), 1 W. & S. 323 (1825); Aff. 2 S. 487.

48. Trustees being directed to lay out the “residue of the trust funds, interest and proceeds thereof,” in the purchase of lands to be entailed, the heirs to be called under the entail are entitled to the interest of the residue after deduction of costs of management from the period of twelve months after the testator's death until the lands are bought. — *Earl of Stair v. Earl of Stair's Trs.*, 2 W. & S. 414 & 614; 1 *Bligh*, N.S. 662; 1 *Dow & Clark*, 44 (1827); *Rev.* 5 S. 476.

49. Some of the prohibitions in a tailzie being directed against the institute by name and the other heirs of tailzie, others, and the resolute and irritant clauses, only against the “said heirs of tailzie above mentioned,” though the whole was prefixed by a declaration that the conveyance was with and under the burdens, conditions, restrictions, &c., and clauses irritant after expressed, which were declared to be binding not only on the institute and substitutes but also on the entailer's heirs whatsoever; held that the entail was nevertheless invalid as against the institute. — *Morehead v. Morehead* (Herbertshire), 1 S. & M'L. 29 (1835); *Rev.* 11 S. 863.

50. When the prohibitory and resolute clauses are directed against the institute by name “and other heirs of taillie,” but the irritant clause is directed only against “the said heirs of taillie,” the institute is not restrained from selling or burdening. — *Lord Elibank v. Murray* (Simprim), 1 S. & M'L. 1 (1835); Aff. 11 S. 858.

51. An entail disposing to the entailer in liferent and his eldest son in fee, but applying the fetters only to “the heirs descending of my body, or any of the other heirs of tailzie before mentioned,” is void as

against the institute. — *Macgregor v. Brown* (Lanrick), 3 S. & M'L. 84 (1838); Aff. 15 S. 837.

52. When in an entail the lands are disposed first to one in liferent, the liferenter is not the institute, but the first fiar is, although not born at the time, nor till after the entailor's death. The institute is not barred from challenging the entail as void from defect of the fetters as against himself, by the fact that he has made up his title as heir of entail. — *Logan v. Logan* (Fingalton), M'L. & R. 790 (1839); Aff. 15 S. 291.

53. The resolutive and irritant clauses being introduced with the words "and with and under this irritancy," and the resolutive words which immediately followed being expressly directed against the institute as well as the heirs, but the subsequent irritancy only against heirs, the institute is not fettered. — *Marquis of Breadalbane v. Campbell* (Glencrutten), 2 Robin. 189 (1841); Aff. 1 D. 81.

54. An irritant clause, referring to the institute as well as the heirs, but declaring that the acts specified shall be of no force "and be ineffectual and unavailable against the other heirs called to succeed," is valid as regards the institute as well as the substitutes. There is no ground for the proposition that there may be a valid entail without a prohibitory clause at all. — *Lindsay v. Earl of Aboyne* (Aboyne), 3 S. Bell, 254 (1844); Aff. 4 D. 843; *Adam v. Farquharson* (Finzean), 3 S. Bell, 295 (1844); Aff. 2 D. 1162.

55. An entail with prohibitory, irritant, and resolutive clauses, but of which the irritant clause is defective as against the institute, is effectual to prevent the institute from gratuitously altering the order of succession. — *Carrick v. Buchanan*, 1 S. Bell, 348; 3 S. Bell, 343 (1844); Aff.

V. DEVOLUTION.

56. A clause providing that in case any heir of entail should succeed to another estate, he and the heirs male of his body so succeeding should be obliged to denude in favour of the next heir, does not exclude all the heirs male of the body of the heir so succeeding, but only his eldest son. — *Leslie v. Leslie* (Balquhain), Cr. & St. 324 (1742); Rev.

57. In a tailzie with a clause of devolution it is incompetent for the heir in possession to grant provisions (even if otherwise valid) to younger children, to take effect only in the event of the devolution coming into operation. Other special questions occurred in the same case respecting the devolution of bonds of provision as altered by a general settlement. — *Earl of Cassilis v. Hamilton* (Riccarton), Cr. & St. 381 (1745); Aff. *Elchies v. Provision to Heirs*, No. 6.

58. A clause in a tailzie providing that whenever the heirs "succeeding to and possessing my estate shall also succeed to" another estate, "then the right of my estate in their favours shall cease, and the same

shall fall to the next heir of entail appointed to succeed," carries off the estate to the next heir as soon as the succession opens to a party already in possession of the other estate. — *Ross v. Lockhart* (Balnagowan and Craigmiller), Cr. & St. 610 (1756); Aff.

59. Under a clause of devolution the estate must go strictly as directed in the tailzie, though a nearer heir may exist than the tailzie calls. — *Lawrie v. Macghie* (Redcastle and Skeldon), 2 P. 309 (1773); Aff.

60. An entail providing that on an heir of entail succeeding to another estate, his right should cease from the next term, "or in his option next after he shall have a second lawful son attained to the age of fourteen years, during which space I dispense with the said heir of entail using my surname and coat armorial," entitles the heir in possession, on succeeding to the other estate, to hold the entailed lands during his life, if he has not a second son born, or if he has, till the son attains fourteen. — *Hay v. Marquis of Tweeddale* (Linplum), 2 P. 322 (1773); Aff. M. 15425.

61. Under a clause of devolution in the event of the heir succeeding to another estate, the heir already in possession of the other estate is bound to denude of the entailed estate on the succession opening to him. An heir taking under the clause of devolution is bound by the fetters. In Court of Session, 3 P. 690. — *Henderson v. Henderson*, (Earlshall and Fordell), 3 P. 686 (1791); Aff. M. 4215.

62. An heir of entail in possession repudiated the succession before making up titles (the entail not requiring him to make them up), to the effect that his brother, the next heir, might take it, reserving the right of his own heirs on failure of the heirs of the body of his brother; and the brother brought a declarator of his title thereunder, and obtained decree in absence, and possessed on charter and sasine for thirty-eight years, and then executed a settlement of the estate upon himself and the heirs of his body, whom failing, the heirs of the body of the heir who had repudiated. The next heir, several years after, brought a declarator of contravention against both brothers, and the heirs of their bodies, to which was pleaded a title to exclude in virtue of the positive prescription. Held that in the circumstances the pursuer had no title to sue, and the validity of the title to exclude was therefore not considered. (Per Lord Eldon) If the case had been *res integra* it would have been difficult to hold that the repudiation was not a contravention, but the law of Scotland is now settled otherwise. — *Fullerton v. Hamilton* (Bargany), 4 P. 175 (1801); Alt. M. 11171.

63. A party in right of two entailed estates, the conditions of which are inconsistent, may, in repudiating the one, reserve right to take it up at any future time, and even without such reservation a subsequent

heir might, on the right opening to him, elect to take the estate in spite of the repudiation, and without reducing it, until barred by prescription. *See* prior decision in the same case, 1 Cr. & St. 237, and 1 S. Ap. 265. — *Fullerton v. Hamilton (Bargany)*, 1 W. & S. 410 and Apx. (1825); Aff. 2 S. 698.

64. An heir of entail, in which there is a clause of devolution, may, before the clause takes effect, sell the estate in virtue of a defect in the fetters against selling. — *Lord Montgomerie v. Earl of Eglinton*, 6 S. Bell, 136 (1847); Aff.

VI. REVOCATION AND ALTERATIONS.

65. A tailzie made on occasion of a marriage gives right even to a gratuitous substitute, not being an heir of the marriage, to apply to have it exhibited and registered in the Books of Council and Session, and it cannot be set aside or altered by the maker even as regards such substitutes. — *Schaw v. Houston (Greenock)*, Robert. 203 (1717); Aff. M. 15372.

66. A tailzie not made for onerous cause may, while remaining personal, be revoked by the maker and institute, although not containing a power to revoke. — *Scott v. Scott (Harden)*, Robert. 226 (1718); Aff. M. 15569.

67. A gratuitous deed of entail undelivered, containing power to affect or burden the lands, may be revoked by the maker. — *Heron v. Heron (Bargaly)*, 2 P. 187 (1770); Rev.

68. An entail recorded and feudalised, having been executed in implemēt of an onerous obligation, cannot be revoked by the maker with consent of the institute and of the parties to the obligation. — *Macculloch v. Macculloch (Barholm)*, 6 P. 785 (1772); Aff. M. 15579, and 1 Hailes, 432.

69. An entail in favour of a stranger as institute, redeemable on payment of a stated sum, and under proviso that the institute should pay off certain mortgages, held to be capable of being revoked by the maker and the institute. — *Earl of Moray v. Ross*, 6 P. 801 (1744); Aff. Elchies, Tailzie, No. 22.

70. An entail containing power to revoke, is not revoked by a subsequent trust-deed executed by the entailer of all his property, with express exclusion of his entailed estate, and substituting the trustees, of whom the institute was one, for himself in mercantile companies of which he was a partner, and conferring on them a power to contract debt. — *Douglas v. Glassford (Dougalston)*, 1 W. & S. 323 (1825); Aff. 2 S. 487.

71. An entail being executed in 1776, and another contravening it in 1809, which was challenged on the ground of fraud, but sustained,

this last annihilates the prior entail. — *Dickson v. Cuninghame* (Kilbucko), 5 W. & S. 657 (1831) ; Aff. 7 S. 503.

See DEATHBED, 20—HEIR (*Revocation*).

VII. FETTERS.

1. *By Reference.*

72. A conveyance “under the conditions, provisions, and limitations contained in” a tailzie of other lands is effectual to prevent gratuitous alienation by any of the heirs. — *Don v. Don* (Rutherford), Robert. 76 (1713) ; Aff. M. 15591.

73. Lands not included in an original deed of entail, but disposed by a subsequent deed to the same series of heirs, and containing the fetters by reference only, are not effectually entailed although included in the subsequent infeftments of the whole lands. — *Lindsay v. Earl of Aboyne* (Drumniachie), 3 S. Bell, 254 (1844) ; Aff. 4 D. 843.

74. An entailer having by subsequent deed revoked the whole destination, with the exception of one of the substitutes, and made him the institute, with a new series of substitutions, but only referred to the first deed for the fetters, and assigned the precept and procuratory it contained to the new institute ; held that the new deed was virtually a new entail, and was bad as containing fetters by reference only, that the heirs taking under it were not bound to render it valid, and that the assignation of precept and procuratory by the granter himself was incompetent. — *Gammell v. Cathcart* (Countesswells), 1 M’Q. 362 ; 2 Stu. H. L. 32 (1852) ; Aff. 12 D. 19.

See FORFEITURE, ¹⁵59.

2. *Validity of Fetters.*

75. A prohibition duly fenced against contracting debt, does not invalidate a sale, where there is no special prohibition against selling. — *Richart v. Hopetoun* (Keith), Cr. & St. 143 (1734) ; Aff.

76. Prohibitions duly fenced against altering the order of succession, contracting debts, or doing any fact or deed that may lead to eviction, are not sufficient to prevent a sale where it is not expressly prohibited. — *Davidson v. Sinclair* (Carlourie), Cr. & St. 459 (1750) ; Aff. M. 15382.

77. A defect in the resolute clause as regards contraction of debt, renders the estate liable for debt. — *Forbes v. Skene* (Pitrichie), Cr. & St. 628 (1757) ; Aff.

78. Question undetermined, whether an entail completed by infeftment prior to the Act 1685, but not recorded under that Act, is valid ; but the want of a resolute clause in any case held fatal. Opinion, per Lord Hardwicke, that an heir next in succession to one contravening, and evicted under such a defect, has good action against the con-

travener and his personal representatives, to purge the estate. — *Hepburn v. Congalton* (Humbie), 2 P. 17 (1758); Aff. M. 15507.

79. A prohibition against doing any fact or deed in prejudice of the other heirs, their right of succession, is not effectual against a sale of the estate. — *Young v. Nisbet* (Dirleton), 2 P. 98 (1765); Aff. M. 15516.

80. An entail was directed by private act to be made in the same terms as a former entail. In both, the prohibitory and irritant clauses were good, but the resolute clause, after resolving the right of all heirs who might contravene and incur the said clauses irritant, or any of them, proceeded to enumerate the particular contraventions, and omitted sales. Held that, though the general clause would have been sufficient, the defect in enumeration was fatal. — *Bruce v. Bruce* (Tillycoultry), 4 P. 231 (1801); Aff. M. 15539.

81. The omission to mention sales in a resolute clause is not cured by the mention of "any other deed of omission or commission, whereby the lands may be evicted or affected in manner foresaid." — *Moncreiff v. Cuninghame* (Bonnington), 4 P. 652 (1804); Aff.

82. A prohibition against doing anything to the hurt of these presents, and of the foresaid tailzie and succession, is effectual against altering the order of succession. — *Ker v. Innes* (Roxburgh), 5 P. 362 (1810); Aff. M. Tailzie, Ap. 1 No. 13.

83. An entail being held bad as against selling, and the lands being accordingly sold, remit to consider whether there was any obligation on the heir selling to reinvest the price. — *Denham v. Lockhart* (Westshiels), 6 P. 85 (1815); Rem. F. C. 11th June 1811.

84. An irritancy directed only against "debts and deeds whereby the lands might be burdened," but not expressly mentioning sales, which were mentioned in the prohibitory clause, does not apply to sales. — *Barclay v. Adam* (Blair-Adam), 1 S. Ap. 24; 3 Bligh, 275 (1821); Aff.

85. It is sufficient if the irritancy be declared against deeds or debts done or contracted as against the other heirs of tailzie, without being declared in themselves null and void. — *Munro v. Munro* (Fowlis), 3 W. & S. 344 (1828); Aff. 4 S. 467.

86. An entail containing a prohibition against selling, but not expressly fenced by irritant and resolute clauses (Ascog) applying to sale, or fenced by an irritant but not by a resolute clause (Tillycoultry), is not effectual to prevent a sale, and does not create an obligation for reinvestment of the price for behoof of the substitutes, nor give them any claim for damages against the heir selling. (Per Lord Eldon) "I think the doctrine of non-implication, as applied to Scotch entails, has gone a great deal too far, but it must now be supported." —

Stewart v. Fullarton (Ascog), 4 W. & S. 196 (1830) ; Alt. 5 S. 418 ; *Bruce v. Bruce* (Tillycultry), 4 W. & S. 240 (1830) ; Alt. 5 S. 822. See 213.

87. A tailzie defective in the fetters imposed upon one contravention was not to be held void as to the others. The prohibition against contracting debt being defective, allowed *bonâ fide* debt to be contracted, but did not allow the order of succession to be changed by means of collusive and simulate debt. — *Cathcart v. Cathcart* (Carleton), 5 W. & S. 315 (1831) ; Aff. 8 S. 497.

88. The words which would have been the nominative to the verb in the irritant clause ("all such acts, deeds, and debts") being omitted in extending the deed, they cannot be supplied by the Court, as although it may be clear what they ought to be, it is not certain that the entailer would have made them so. — *Sharpe v. Sharpe* (Hoddam), 1 S. & M'L. 594 (1835) ; Rev. 10 S. 747. This case explained, House of Lords, 8. See Deed, 19, 26.

89. Sales are not struck at by a declaration that the lands shall not be affected, or liable to be adjudged or evicted for or by the debts or deeds of the institute or heirs, or by their acts of omission or commission. — *Marquis of Breadalbane v. Campbell* (Glencrutten), 2 Robin. 109 (1841) ; Aff. 1 D. 81.

90. Where an entail after a full prohibitory clause contained an irritant clause "in case the institute, or any of the heirs of tailzie, shall contravene or fail in performing any part of the premises, particularly by neglecting to assume the surname," and proceeded to enumerate other contraventions, but without mentioning sales, and concluded, "or shall contravene or fail in any part of the premises ;" held that sales, not being expressly mentioned, were not invalidated. — *Rennie v. Horne* (Balliliesk), 3 S. & M'L. 142 (1848) ; Rev. 15 S. 372.

91. Question, whether an entail of which the fetters are contained in the dispositive clause is invalid if they are not *verbatim* repeated in the procuratory and precept, except by the general words, "the conditions, provisions, restrictions, declarations, and reservations before mentioned," without addition of "clauses irritant and resolute." — *Rennie v. Horne* (Balliliesk), 3 S. & M'L. 142 (1848) ; 5 S. 376. See 101.

92. A prohibitory clause declaring "that it shall not be allowable to sell off or dispose upon any part of the lands, nor to contract debt, or do any other deed whereby the lands may be adjudged or evicted from the succeeding members of entail, or their hopes of succession thereto in any measure evaded," held ineffectual against altering the order of succession ; and the irritant clause declaring, "and if they do in the contrary, all such debts and deeds shall be intrinsically void and null," held not to apply to sales. Observed that *Maclaine v. Maclaine* (Lochbuy), 23d June 1837, F.C. is not law. Observed that such cases are ruled

only by precedents, and the Act 1685 gives no rule for them. — *Lang v. Lang* (Overton), M'L. & R. 871 (1839); Aff. 1 D. 98. *But see* 104.

93. A prohibition against selling, contracting debt, or doing "any other fact or deed in prejudice of the said tailzie and of the persons above named, and their foresaids;" and a resolutive clause, "if any of the said heirs shall fail herein, or do anything contrair to this my destination and appointment," and an irritant clause "of all dispositions and deeds whatsoever made or done contrair to the said provision and destination;" held effectual against altering the order of succession. Question, whether a prohibition against altering the order of succession needs to be fenced. — *Monypenny v. Campbell* (Strathbrock), M'L. & R. 898 (1839); Aff.

94. Though fetters are not to be imposed by implication, the intention of the entailer, gathered from necessary intendment, is admissible respecting the directions as to the title under which the heir is to possess. (Per Lord Brougham.) — *Graham v. Bontine* (Gartmore), 1 Robin. 395 (1840); 15 S. 711.

95. A prohibitive clause, *inter alia*, prohibited wadsetting or feuing; the irritant clause was applied to "all such deeds of contravention whether altering the course of succession, selling, alienating, or burdening the lands, and all acts done contrary to the above-written conditions and provisions shall be void and null." Held that wadsetting and feuing were effectually irritated. — *Anstruther v. Anstruther* (Caiplie), 2 S. Bell, 242 (1843); Aff. 3 D. 142.

96. When the prohibitory clause expressly mentioned sales, but the irritant clause only referred to all the debts and deeds contracted, made, or granted in contravention of the entail, and the conditions, provisions, limitations, and restrictions therein contained; held that sales were effectually prohibited. Observed that a sale by act only, and *rei interventu*, need not be provided against in an entail, and would not be enforced by adjudication in implement in such case. Observations on the language and interpretation of entails. — *Lumsden v. Lumsden* (Auchendoir), 2 S. Bell, 104 (1843); Aff. 3 D. 136.

97. A resolutive clause directed merely against "the persons so contravening," and "such contravention" is sufficient. An irritant clause directed against "such acts and deeds,"—"done, acted, committed or granted," is effectual against sales, they having been included expressly in the prohibitive clause. — *Montgomerie v. Earl of Eglinton* (Coilsfield), 2 S. Bell, 149 (1843); Aff. 4 D. 425.

98. There being a prohibition against selling, alienating, or disposing, followed by an irritant clause against alienating or disposing; held that it is effectual against sales. A prohibition against doing any other fact or deed, followed by an irritant clause against doing any other

deed ; held that " deed " includes the act of selling. A declaration that the irritancy is so that the lands shall be nowise affected or burdened therewith in prejudice of the succeeding heirs, does not restrict the irritancy to burdens only. — *Murray v. Murray* (Cockspow), 3 S. Bell, 100 (1844) ; Aff. 4 D. 803.

99. A prohibition " to burden or affect the lands with debts," &c., is effectual against the contracting of debts. — *Adam v. Farquharson* (Finzean), 3 S. Bell, 295 (1844) ; Aff. 2 D. 1162.

100. An irritant clause declaring that " upon every contravention not only the estate shall not be burdened or liable to the debts, deeds, crimes and acts of the heirs so contravening, but also all debts, deeds, or acts contracted, done, or committed contrary to the above conditions and restrictions, shall be absolutely null ;" and a resolute clause declaring that " in case any of the heirs shall contravene any of the before written conditions, provisions, limitations, or restrictions, that is, shall fail or neglect to perform the said conditions and provisions above set down, or any of them, or any after restrictions that may be added by me, the person so contravening, by failing to obey the said conditions, or by acting contrary to the above limitations and restrictions, shall forfeit." Held valid. — *Adam v. Farquharson* (Finzean), 3 S. Bell, 295 (1844) ; Aff. 2 D. 1162.

101. In an entail after a full prohibitory clause the resolute declared, that if the heirs, &c., " shall at any time fail herein, or do anything contrary to this my destination and appointment, then the person or persons so failing and doing on the contrary hereof shall amit their right ;" and the irritant clause declared that " all dispositions, and other deeds whatsoever made or done contrary to the said provision and destination, with all that shall follow thereon, shall be *ipso facto* void." Held that these general clauses were sufficient. The prohibitions, &c., need not be repeated in the procuratory and precept in the same deed, if generally referred to. — *Earl of Buchan v. Erskine*, 4 S. Bell, 22 (1845) ; Aff. 4 D. 1430, 1435.

102. After a full prohibitory clause, the resolute clause declared that if any heir " shall contravene the before-written provisions, conditions, restrictions, and limitations, that is, shall fail to obey, fulfil, or perform the said conditions and provisions, or any one of them, or shall act contrary thereto, he shall amit," &c. ; and the irritant clause declared that " upon every contravention by failing to perform all and each of the conditions, or acting contrary to all or any of the restrictions, not only the said lands shall not be burdened and liable to any of the debts and deeds, acts and crimes, but also all such debts, deeds, and acts contracted, granted, done, or committed contrary to these conditions and restrictions, shall be of no force, and shall be unavail-

able against the other heirs of tailzie." Held that sales were effectually prohibited. — *Dingwall v. Dingwall* (Rainniestown), 4 S. Bell 149 (1845); Aff. 4 D. 816.

103. A trust-deed directing the trustees to convey an estate in terms of a prior unrecorded entail, does not give the heirs substitute any title to challenge a sale made by the first substitute taking under the conveyance by the truster. — *Earl of Mansfield v. Stewart* (Logie-almond), 5 S. Bell, 139 (1846); Aff. See 24. "

104. An entail with specific prohibitions not to alienate or burden, nor to contract debts, or to alter the course of succession by any fact or deed, omission or commission, with irritant clause against "all such facts and deeds, omissions and commissions," and resolute clause applying to altering the order of succession or violating any of the provisions and conditions before mentioned. Held ineffectual against sale. Observed that precedents in the construction of entails are of no authority unless the identical words are found in both. Observed that the language in entails is to be construed in its natural and grammatical meaning. — *Murray v. Graham* (Balgowan), 6 S. Bell 441 (1849); Aff. 10 D. 380.

105. A prohibition to "contract debts upon the lands," followed by an irritancy of "disposing upon or affecting the said lands whereby they may be evicted and adjudged," is effectual against personal debts being made real. Observed that an enumeration of prohibited acts does not impair a general prohibition preceding, unless the entailer appears to have undertaken to enumerate all the acts. — *Dewar v. Cleghorn* (Feddal), 7 S. Bell, 32 (1850); Aff. 8 D. 90. *Bogle v. Cochrane* (Murdostown), 7 S. Bell, 65 (1850); Aff. 11 D. 908.

106. Under a defect in the prohibitions against selling, it was incompetent to adjudge for debt. — *Bogle v. Cochrane* (Murdostown), 7 S. Bell, 65 (1850); Aff. 11 D. 908.

107. After a full prohibitory clause against selling, burdening, or altering the succession, an irritant clause, "if the heirs shall contravene or do in the contrary or any point of the premises, then all such debts, facts, and deeds are declared to be void," would be sufficient; but being followed by the words, "in so far as the same might infer any actions, personal or real, against the next heir or the lands," it is ineffectual against sales. — *Lord Wharncliffe v. Nairne* (Drumkilbo), 7 S. Bell, 132 (1850); Aff. 12 D. 1.

108. An entail prohibiting the altering the order of succession, selling, burdening, contracting debts, or committing any other deed, civil or criminal, by which the lands may be adjudged evicted or forfeited, followed by an irritant clause "in case the said heirs shall do or commit any such deeds or contract such debts," is invalid against

selling or altering the order of succession. — *Ogilvie v. Earl of Airlie* (Auchterhouse), 2 M'Q. 260 (1855) ; Aff. 15 D. 252.

109. The general rule in construing a deed of entail is, that the words are to have their natural meaning, but if equally capable of two meanings, that is to be adopted which is in favour of freedom from the fetters. (Per Lords St Leonards and Cranworth.) — *Ogilvie v. Earl of Airlie* (Auchterhouse), 2 M'Q. 260 (1855) ; 15 D. 252.

110. An entail which, after a full prohibitory clause, contains an irritant clause, which omits one of the acts prohibited, but irritates "all other crimes, treasons, deeds, and acts done in the contrary of this present taillie" (Kintore), or "any one of the several particulars above mentioned" (Haulkerton), is valid, on the principle that the general words include by reference all the prohibitions though omitted in the special enumeration. — *Earl of Kintore v. Lord Inverury*, 4 M'Q. 520 (1863) ; Aff. 2 D. 1105.

VIII. POWERS TO FEU AND LEASE, AND LEASES AND FEUS UNDER.

111. A power to feu without diminution of rental does not warrant a feu to the actual tenant of the lands reserving a feu-duty not less indeed than the existing rental, but where a further payment was made by the tenant as a consideration for obtaining the feu. The vassal cannot, in a reduction of the feu-charter in such a case, object that if it were not within the power of the granter it would import a contravention involving forfeiture of the estate by the heir of entail pursuing the reduction. Prescription on the charter in such a case commences to run, not from the date of the charter, but from the expiry of the lease which the vassal had held. — *Duke of Roxburghe v. Wauchope*, Cr. & St. 126 (1734) ; Rev. in part.

112. In a strict entail a reserved power to grant feus or long tacks of any parts or portions of the lands does not authorise a feu of whole farms, or of the mansion-house and grounds. An heir of entail in possession cannot sell growing timber unfit for cutting, nor even such as is fit if the sale is only to take effect after his death. — *Lord Cathcart v. Shaw* (Greenock), Cr. & St. 618 (1756) ; Aff. M. 15399.

113. An entail containing no prohibition against leasing, but in the irritant clause authorising leases for fifteen years and without diminution of rental, otherwise such tacks to be void and import a contravention, does not prevent the grant of a lease for nineteen years ; and a tack granted for nineteen years if the lessor should live so long, and if not, then for as long as the entail authorised, is valid for nineteen years, though the lessor predecease. — *Carre v. Cairns* (Cavers), 2 P. 343 (1774) ; Aff. M. 15523.

114. Leases for four nineteens granted to the law agent of the heir

of entail, under a power in the tailzie to grant leases of any part of the lands, are valid, but not as regards the mansion-house, and a lease in reversion is not covered by the power. (*See* explanation in 2 Dow, 113.) — *Orme v. Leslie* (Balquhain), 2 P. 533 (1780) ; Aff. M. 15530.

115. When a tailzie limits the power of leasing to nineteen years, a new lease granted to the tenant in possession, before the expiry of an existing lease, to run for nineteen years from the expiry, is not binding on a succeeding heir of entail for more than nineteen years from the date of granting the lease. — *Kerr v. Redhead* (Chatto), 3 P. 309 (1794) ; Rev. Bell Ca. 202.

116. An entail contained a power to grant feus of such parts of the estate as the heir might deem fitting, without diminution of rental. Held, after remit, that feus of the whole estate, with backbond binding the vassal to execute an entail as the superior might direct, were not within the power, and were bad as an alienation. A feu of the mansion-house and grounds was also bad. — *Ker v. Ker* (Roxburgh), 5 P. 609 and 768 ; 2 Dow, 149 (1812–13) ; Aff. M. Tailzie, Ap. No. 18.

117. Under a strict entail, containing a power to grant leases during the lifetime of the granter or grantee, a lease for ninety-seven years is reducible after the granter's death. — *Duke of Queensberry's Trustees v. Earl of Wemyss*, 5 P. 758 ; 2 Dow, 91 ; Aff. M. Tailzies, Ap. No. 15 ; *Henderson v. Malcolm*, 2 Dow, 285 (1814).

118. An entail (Neidpath) containing a prohibition to alienate, with a power to grant leases for the lifetime of the heir or the receiver, the same being granted without evident diminution of the rental, renders invalid a lease granted for fifty-seven years (Harestanes), or for any period with a grassum, and a lease granted on the renunciation of a former lease for which a grassum had been paid, is also invalid (Eds-toun). — *Montgomery v. Earl of Wemyss* (and others) (Queensberry leases), 6 P. 465, 482, 489, 516, 507 ; 5 Dow, 293 ; 1 Bligh, 339 (1820) ; Aff. F.C. 17th November 1815.

119. An entail (Queensberry) containing a prohibition to dispo-ne, but not to alienate, with a power to grant leases not for longer spaces than the granter's lifetime, or nineteen years, and that without diminution of the rental, at the least for the just avail for the time, renders invalid a lease granted on renunciation of a former lease for which a grassum had been paid. — *Duke of Buccleuch v. Hyslop*, 6 P. 520 ; 5 Dow, 293 ; 1 Bligh, 339 (1820) ; Rev. F.C. 7th March 1816, 5th February 1818.

120. An entail containing a prohibition to set tacks for longer than nineteen years, and without diminution of the rental, and not taking grassums, but such reasonable rents as can be got therefor, does not prevent an heir in possession from taking renunciations of unexpired

leases, and granting them anew, either at the same or a higher rent, in all cases in which the original leases would have endured till the date of the summons by the next heir challenging them. Remit to consider whether in other cases the rents for which the new leases were granted were reasonable or not. — *Marquis of Queensberry v. Montgomery (Tinwald)*, 6 P. 552 (1820); Aff. F.C. 17th November 1815.

121. A lease at an under rent granted to a trustee, in order to make a provision for another, is a violation of a power of leasing without evident diminution of rental. Question, Whether receipt of the diminished rents by the successor homologates the lease? — *Duke of Hamilton v. Esten*, 6 P. 644; 2 Bligh, 196 (1820); Rev.

122. Funds being given to trustees to be laid out in lands, which are to be entailed, without any direction as to powers of leasing, and the entail executed containing a prohibition against leasing without diminution of rental, held that the prohibition was valid, and that a lease for 1000 years, with a grassum, fell under the prohibition. — *Turner v. Turner (Turnerhall)*, 1 Dow, 423 (1813); Aff. M. Tailzie, Ap. No. 16.

123. In a tailzie the word “dispose” is equivalent to alienate, and an irritant clause directed against dispositions includes an irritancy of alienations, and leases of seventy-seven years with a grassum are such alienations. — *Elliott v. Pott (Stobbs)*, 1 S. Ap. 16; 3 Bligh, 134 (1821); Rev. F.C. 10th March 1814.

124. In a strict entail a power to set tacks for such time as the heirs shall think fit, provided it is not at a rent lower than the rate set forth in the tailzie, authorises a lease for 999 years at such rent, with a large grassum. — *Earl of Elgin v. Wellwood (Garvoch)*, 1 S. Ap. 44 (1821); Aff.

125. An irritancy incurred by setting tacks with grassums cannot be purged so as to validate the tacks after the contravener's death by converting the grassums into annuities. — *Montgomerie v. Duke of Buccleuch*, 1 S. Ap. 59 (and *Hyslop v. the same*, p. 64), 6 P. 819 (1821); Aff. F.C. 6th July 1820.

126. A lease for seventy-seven years of part of an entailed estate is a contravention, and cannot be sustained even for a shorter term, though the prohibitions are only against selling, burdening, or away putting, and it may be set aside after the death of the contravener by a substitute heir serving to the contravener, although its existence was known to the substitute in the lifetime of the contravener. Away put is correctly translated in the charter as “dilapidare.” — *Innes v. Baroness Mor-daunt (Dorris)*, 1 S. Ap. 169 (1822); Aff. F.C. 9th March 1819.

127. It is not a good objection to the pursuer of a reduction of a lease as *ultra vires* of an entail that he had, before succeeding to the estate, given a sum of money to the lessee to obtain a cancellation of an

agreement with a prior substitute which recognised the lease. — *Innes v. Mordaunt* (Durris), 1 S. Ap. 169 (1822); Aff. 1 S. 150.

128. An heir of tailzie in possession having let leases at grassums in contravention of the tailzie, but from its not having been recorded, the lease not being subject to be reduced; remit to the Court to review their judgment finding the executors of the contravener liable in damages to the heir succeeding to the estate. — *Queensberry Trustees v. Marquis of Queensberry*, 2 W. & S. 265 (1826); 4 S. 320. See 130.

129. In a tailzie a prohibition against disposing strikes at a lease for 300 years of a loch. Query, What period of lease of such a subject would be legal? — *Stirling v. Dun*, 3 W. & S. 462 (1829); Rev. 6 S. 272.

130. When an heir of entail grants leases in contravention of the entail, but which cannot legally be reduced, a substitute has no claim for damages on account of loss or injury thence arising, but the sole remedy is that which the entail confers in case of contravention. — *Duke of Queensberry's Exrs. v. Marquis of Queensberry*, 4 W & S. 254 (1830); Rev. 6 S. 706.

131. The 10 Geo. III. c. 51, makes leases of longer duration than it sanctions fraudulent (*semble*). — *Innes v. Exrs. of Duke of Gordon*, 4 W. & S. 305 (1830); Aff. 6 S. 279.

132. An entail contained a prohibition and irritancy against granting leases for more than nineteen years, but no corresponding resolute clause. Held that the defect did not affect the general rule against long leases as being alienation. Observed that no fixed duration has been assigned by any decision for the limit of a valid beneficial lease under an entail, and that both nineteen and twenty-one years are common periods. — *Anstruther v. Anstruther* (Caiplic), 2 S. Bell, 242 (1843); Aff. 3 D. 142.

133. A power to sell the whole of the lands entailed, except the mansion-house, on the purchase and entail of other lands, is not inconsistent with an entail. — *Baird v. Baird* (Newbyth), 6 S. Bell, 7 (1847); Aff. 6 D. 643.

See ACQUIESCENCE, 4—BONA FIDE POSSESSION, 3, 4.

IX. POWERS TO GRANT PROVISIONS.

134. An entail having reserved right to the entailer to grant jointures and provisions to a second wife or children, and a subsequent deed, unregistered and undelivered, having restricted this faculty that it should not be exercised to a further extent than L.100,000 Scots for younger children, "or for the haill provisions in favour of the haill children or wives of subsequent marriages," and on a second marriage the entailer having provided to his wife a jointure of L.1000 sterling

a-year by a post-nuptial deed, she was, in a question with the eldest son of the first marriage, found entitled to draw the L.1000 a-year till the L.100,000 Scots was exhausted, and no longer. — *Marchioness Dowager v. Marquis of Annandale, Robert*. 411 (1722); *Alt.*

135. The heir in possession is bound to keep down interest on bonds granted by him in fulfilment of obligations entered into in the marriage-contract of his daughter, but not on bonds granted gratuitously within the provisions of the tailzie. — *Lord Cathcart v. Shaw (Greenock)*, Cr. & St. 618 (1756); *Aff. M.* 15399.

136. A provision in a tailzie on heirs male, binding them to pay a sum to the daughter and heirs female of the entailor's body, is effectual in favour of the daughter, though there being an heir male she is not properly an heir female. — *Watson v. Glass (Redhouse)*, Cr. & St. 372 (1744); *Aff. M.* 2306.

137. An heir of tailzie having conceived that the tailzie was invalid, settled his whole estate on the daughter. The tailzie being held valid, the daughter was held entitled to a reasonable provision out of the estate, such as the father had power under the tailzie to grant, although he had not exercised such power. — *Craik v. Craik (Duchrae)*, Cr. & St. 543 (1757); *Aff.*

138. A tailzie empowered the heir in possession to grant provisions to children such as the estate might conveniently bear, and as might be agreed to by two of the nearest relations, not exceeding a sum left blank, the estate being worth L.1000 per annum, and having burdens amounting to L.7000, two bonds of provision to an only daughter of L.1000 each held within the power. The circumstance of the daughter afterwards, before her father's death, succeeding to another estate does not avoid the bonds, though they had remained undelivered. — *Bruce v. Carstairs (Kinross)*, 2 P. 329 (1773); *Rev.*

139. An entail having conferred a limited power of granting liferent infeftments to wives, held that an apparent heir, dying after being three years in possession, could validly grant a liferent locality to his wife. — *Graham v. Countess of Glencairn (Finlaystone)*, 5 P. 134 (1806); *Aff. M. Heir Apparent*, Ap. No. 1.

140. Under a tailzie empowering reasonable provisions, one heir having provided to the amount of L.24,000 on a gross rental of L.8700, provisions by a subsequent heir of L.10,000 to each of his two daughters held not unreasonable. — *Earl of Mar v. Erskine (Mar)*, 5 W. & S. 611 (1831); *Aff. 9 S.* 126.

141. Under an entail which contained a power to burden the estate with provisions not exceeding three years' clear rental, it is competent for the heir in possession to grant a bond in favour of his daughters, not payable until an heir other than of his own body shall succeed,

and interest on it is due from the time of that event happening. — *Porterfield v. Howden* (Duchal), 1 S. & M'L. 739 (1835); Aff. 12 S. 734.

142. A bond by an heir of entail, undelivered and revocable, providing three years' clear rent to younger children, is effectual against the heirs succeeding, though the granter was not in actual possession, in consequence of a competition of briefes which was only decided after his death, and the rents were drawn by a factor appointed jointly by him and his competitor, and he was in possession (in this way) for only three years and five months, and did not draw three full years' rent. In computing the free rental, the interest only of real burdens is to be deducted, and not the capital. — *Porterfield v. Corbet* (Duchal) 1 S. Bell, 476 (1842); Aff. 2 D. 573.

143. Under a power in an entail to provide widows in lieu of terce in annuities not exceeding a fourth part of the free rents of the estate, after deducting certain specified burdens, but that the widows should have no right to possess the mansion-house, or enclosures or policies belonging to it, a widow is entitled to one-fourth of the rent of the home farm, though kept by her late husband in his own hands, and also of the shootings let (and, per Lord Brougham, even if unlet), and the rental is not to be considered as varying from year to year, but as what it was at the husband's death, and not subject to deductions for maintaining an embankment, repairing the parish church, or factor's fee. — *M'Pherson v. M'Pherson* (Belleville), 5 S. Bell, 280 (1846); Aff. 1 D. 794.

144. A will having directed lands to be purchased by trustees, and settled on the heirs of an entail of other lands, the first heir who would take is entitled, on succeeding, to grant his wife an annuity over the lands to be purchased, in terms of a power contained in the entail referred to. — *M'Pherson v. M'Pherson* (Fairburn), 5 S. Bell, 280 (1846); Aff. 1 D. 794.

145. A power to charge the estate with provisions to children lies in the discretion of the holder of the entailed estate for the time being, and cannot be exercised by charging the estate with a sum to be applied by trustees for the children in the manner they may think most advisable. It may be validly exercised by giving the provision to trustees for the younger child for life only, without power to him to anticipate it, but it is incompetent to direct the trustees to invest the capital in land, to be entailed on his children. — *Duke of Northumberland v. Macregor* (*Tulibardine*), 5 S. Bell, 396 (1846); Aff. 2 D. 1840.

146. Under an entail containing a power to grant provisions to younger children, an heir of entail who takes for his life only, and not to the heirs of his body, cannot grant any provision to his children.

Query, Whether he could under the Aberdeen Act? Observed that though express reference to a statutory power is not necessary to make an execution of it valid, yet the statute will not support an execution never intended to operate under it. — *Dickson v. Dickson (Chatto)*, 1 *M.Q.* 729 (1854); *Aff.* 13 *D.* 1291.

See HUSBAND AND WIFE, 52—PROVISIONS TO CHILDREN.

X. ENTAILER'S DEBT.

147. Debts on an entailed estate are extinguished on payment by the heir in possession, whether he takes assignations to them or not. — *Coms. of Forf. Estates v. Earl of Ruglen* (not reported), *Lords' Journals*, 12th Feb. 1724–5; *Appeal Cases*.

148. A bond of provision of the entailer in favour of the second son and his heirs, whom failing, the heirs of tailzie, is not extinguished by becoming vested in one of the heirs of tailzie succeeding to the estate, and not making up a title to the bond. — *Irvine v. Cumming (Drum)*, *Cr. & St.* 103 (1733); *Aff.* *M.* 3042. *See* *Security*, 11.

149. A power to burden an entailed estate for the entailer's debt warranted wadsets for the same, which were a sufficient ground of an apprising, whereof the legal might run. — *Duke of Roxburgh v. Kerr*, *Cr. & St.* 156 (1735); *Aff.* *See* *Real Burden*, 2.

150. A tailzie being made for onerous consideration in favour of the maker as institute, the estate is only liable for his debts incurred previously, and undischarged at his death, and for such debts incurred subsequently as were made real prior to infestment taken on the entail. — *Agnew v. Stewart (Sheuchan)*, 1 *S. Ap.* 320 (1822); *Rev.*

151. An heir of entail having discharged a wadset of the entailed lands, by taking not only a discharge, but a resignation *ad remanentiam*, and executed it by resigning in his own hands, the wadset is extinguished, and the whole estate falls under the fetters of the entail; but having subsequently disposed the wadset lands to a trustee, for behoof of younger children, under the belief that it was in law still subsisting, the rents paid by the trustee under the deed are held as *bonâ fide consumpti*. — *Duke of Roxburgh v. Wauchope*, 1 *W. & S.* 41 (1825); *Aff.* *F. C.* 14th Dec. 1815, and 1 *S.* 487. *See* 13.

152. An entailer having burdened his heirs in the entailed estate with all his debts, and having also, in a settlement of his whole other property, burdened it with all his debts, they must be paid rateably out of the entailed and the other estates. — *Moncreiff v. Skene (Hallyards)*, 1 *W. & S.* 672 (1825); *Rev.* *See* *Heir*, 70—*Heir and Executor*, 1.

153. An onerous entail protects the estate against future debt of the entailer (*Sheuchan*), but a gratuitous entail does not. An entail is not onerous which is made in virtue of a submission between two

brothers, claimants to the estate, and (*semble*) it can only be onerous if made in consideration of marriage. — *Dickson v. Cunningham* (Kilbucko), 5 W. & S. 657 (1831); Aff. 7 S. 503.

154. A proprietor of three estates executed different entails as to each, and in that last executed he declared that it was granted under burden of payment of his debts, and also under burden of payment of certain additional provisions to his daughters, and made the heirs of entail his executors; held, on his son, the institute, becoming bankrupt, after succeeding, that the daughters could only rank as personal creditors, but that the heirs would be liable in their order on succeeding. — *Kerr v. Keith* (Ashkirk), 1 S. Bell, 386 (1842); Aff. 14 S. 458.

XI. CHARGES ON ESTATE.

155. An entail being made prior to 1685, on the dispositive clause of which the maker used inhibition against the institute A., in order to prevent his altering the order of succession, and the institute, when in possession, having, with a view to change the order of succession, conveyed the estate to B., the person he desired to call as heir, and who was a relation of his wife, and at the same time granted him a bond for 500,000 merks, and three years after another bond for L.5000; but the bond for 500,000 merks having been reduced by the heir of the original entail on the succession opening to him, as in fraud of it, and the other bond having lain latent for thirty-five years; held that the bond being gratuitous could not affect the entailed estate, even to the extent of meliorations effected by B., the granter of the bond. — *Comrs. of Forf. Estates v. Earl of Ruglen* (not reported), Lords' Journals, 12th Feb. 1724–5; Appeal Cases.

156. Lands are liable for the debts of the institute prior to the registration of the entail. — *Lord Advocate v. Bayne* (not reported), Lords' Journals, 10th April 1759; Appeal Cases. See 150, 153.

157. An entailed estate may be adjudged for debt contracted after infeftment on the entail, but prior to its being recorded, though the adjudications are subsequent to the recording. — *Munro v. Drummond* (Cromarty), 5 W. & S. 359 (1831); Aff. 6 S. 945.

158. An entailed estate is liable for the debts of the heir in possession on a current account up to the day on which the entail is recorded, but no longer, and the balance existing on that day, after compensation of mutual claims, may be cleared off by sums subsequently realised from special securities. — *Drummond v. Ross* (Cromarty), 3 S. Bell, 87 (1844); Aff. 3 D. 698.

159. A tailzied estate being sold by virtue of an Act of Parliament, obtained on the representation that it was burdened with debt to the full value, the next heir is not barred from bringing an action against

the personal representatives of the seller and the trustees named in the Act, to have the price laid out in land to be entailed, on the ground that the alleged debts were fictitious and fraudulent. — *Mackenzie v. Stewart* (Roystoun), Cr. & St. 578, and 6 P. 711 (1754); Rev. M. 15459.

160. An heir of entail, whether in possession or a substitute, has no title to pursue a reduction of a sale of part of the estate made under the authority of a private Act of Parliament, if he does not claim under the entail, but on a title which is in contravention of it. — *M'Culloch v. M'Kenzie*, 3 W. & S. 352 (1828); Aff. 4 S. 598.

161. A law agent who conducts a litigation by which an entailed estate is recovered, has no legal claim for his costs upon the subsequent heirs of entail on their coming into possession, although his claim, being of the nature of salvage, is the strongest possible in an equitable view. — *Fraser v. Vans Agnew* (Sheuchan), 5 W. & S. 249 (1831); Aff. 8 S. 585.

162. An heir of entail in possession having agreed with a tenant that the latter should erect a steading, the value to be repaid him at the end of the lease, and receiving, meanwhile, an annual sum as interest, the executor of the landlord is bound to relieve the next heir succeeding under the entail of the principal and interest so due to the tenant. Query, Which would be liable on an agreement that the landlord should take a building at a valuation, and pay the tenant the value of lands enclosed by him during the lease. — *Moncreiff v. Tod* (Hallyards), 1 W. & S. 217 (1825); Aff. 2 S. 113.

163. The Montgomery Act (10 Geo. III. c. 51) requires an heir in possession, desirous of making the next heir liable for improvements, to give three months' notice before commencing them to the next heir, and annually to lodge with the sheriff-clerk an account of the sums expended, with the vouchers. Held that the vouchers must be those of the parties who execute the work, and not receipts of tenants to whom the money was paid; but where the vouchers are correct, the House will not inquire minutely whether the three months' notice had expired before the work was begun; but a notice given six years back, the work under which had ceased for three years, while many intermediate notices for other work had meantime been given, will not authorise a further execution of the improvements it covered. Costs refused in a declarator at the instance of the heir in possession to establish the liability of the next heir for the improvements. — *Craufuird v. Torrance* (Grange), 2 W. & S. 429 (1826); Rev. F.C., 1st Dec. 1820.

164. An entailer authorised a claim for meliorations on the part of his tenants on expiry of their leases; the heir of entail in possession at that date, instead of paying the claim, granted new leases deferring it to the expiry of the new period of lease; held that the claim was not valid against the heir who had by that date come into possession, but

was valid as against the representatives of the last lessor. — *Fraser v. Fraser (Lovat)*, 5 W. & S. 69 (1831); Aff. 8 S. 409.

165. An heir of entail is liable for meliorations to a tenant under a lease which was granted after the making of the entail, but before it was recorded. (*Note*—An interlocutor, of which this was one of the findings, was affirmed, but the opinions of the Peers seem to rest their affirmance rather on the second branch of the interlocutor, viz.) An heir of entail may, by receipt of rent under a lease containing an obligation to repay the tenant for meliorations, homologate the lease. — *Graham v. Jolly (Morphie)*, 5 W. & S. 280 (1831); Aff. 2 S. 730 and 7 S. 824.

166. An heir of entail in possession is bound to invest under the entail a sum given him by a canal company for his consent to a deviation of the canal, over and above the price of the land taken, under deduction only of compensation for his temporary inconvenience from execution of the works. — *Gibson v. Maitland*, 6 W. & S. 388 (1833); Aff. 9 S. 443.

167. An heir in possession under an unrecorded entail cannot charge the lands with sums expended in improvements under the 10 Geo. III. c. 51, and the decree of the Court so charging them may be reduced after the lapse of above a year from its date. — *Macdonald v. Lord Macdonald (Macdonald)*, 1 S. Bell, 819 (1842); Aff. 2 D. 889.

See ARBITRATION, 25—INHIBITION, 3—LIFERENTER, 2.

XII. SALES FOR DEBTS AND LAND-TAX.

168. A private act having directed parts of an entailed estate to be sold for payment of debts, by action before the Court of Session brought against the heirs of entail then in being, it is not sufficient to cite infant heirs at their dwelling-place, and their tutors edictally, but a proper representative of them must be brought before the Court, otherwise the sale is invalid, and may be reduced even after the lapse of twenty years. Observed, that an error of judgment in the Court in applying the act will not invalidate a sale, but a failure to observe the provisions of the act will. The rents and profits ordered to be repaid by the purchaser,—but this order recalled. — *Agnew v. Earl of Stair (Sheuchan)*, 6 P. 60, 61 (1814); *Rem.* 1 S. Ap. 333 (1822); *Rev.* 1 S. Ap. 413. *See* 172.

169. Sale of a part of an entailed estate for the redemption of land-tax reduced in respect the seller had not disclosed that the land sold was held under a different entail from that to which the price was applied, but observed that the sale was reduced only because the settler had himself been the purchaser, and that a third party might not have been affected. — *Lawrie v. Lawrie (Redcastle)*, 2 Dow, 556 (1814); Aff. M. Public Burden, Ap. No. 2.

170. A sale of entailed lands for payment of land-tax under authority of the Court of Session, is not reducible, on the ground that by the law, as subsequently interpreted by the House of Lords, the price of the land was incorrectly computed ; or on the ground that the lands were purchased by the counsel who had signed the petition for sale in the Court of Session. — *Earl of Wemyss v. Sir J. Montgomery*, 2 S. Ap. 1 (1824) ; Aff.

171. A purchaser, under a sale for redemption of land-tax, is liable to have the sale reduced on the ground that the Court, in authorising the sale, had not evidence that the lands to be sold, being beyond the value of the tax, could not be divided, or that the sale of the whole was more eligible for the heirs of entail than that of a part would have been. — *Wilson v. Elliott (Stobs)*, 3 W. & S. 60 (1828) ; Aff. 4 S. 429. See 173.

172. A sale of an entailed estate having been reduced, on 31st July, by the House of Lords on the ground of nullity, reversing the decision of the Court of Session, the rents due at Martinmas following belong to the successful party. Observation by Court of Session Judges on the decision of the House in *Agnew v. E. of Stair*, 168. — *Robertson v. Earl of Stair*, 3 W. & S. 286 (1828) ; Alt.

173. A sale of entailed lands for redemption of land-tax having been reduced as illegally conducted, the purchasers held entitled (though aware of one element of the illegality) to *restitutio in integrum*, so far as possible, while applying the same equity to the heirs of entail. The amount of the land-tax redeemed was therefore declared to be a real burden on the estate in their persons, as also the entailer's debts and provisions to children, which had been paid off with the surplus, but the heirs of entail were not to be personally liable for the principal of these sums, but only bound to keep down the interest. Inhibition used by the purchasers against the heir in possession not recalled on his succeeding to another estate. — *Elliott v. Cleghorn (Stobs)*, M'L. & R. 1033 (1839) ; Aff. F. C., 2d June 1837.

XIII. CONTRAVENTIONS.

174. The contracting of personal debts on which diligence against the estate has not followed is not an irritancy, nor is the suffering adjudication for arrears of annuity due to the entailer's widow, that being entailer's debt. — *Stewart v. Denham (Westshiels)*, Cr. & St. 316 (1742) ; Aff. M. 15557.

175. A new entail, introducing a new substitute, but without further charge, is a contravention of an existing entail. — *M'Culloch v. M'Kenzie (Barholm)*, 3 W. & S. 352 (1828) ; Aff. 4 S. 598. But see *Heir*, 8.

176. Question whether an incumbrance on an entailed estate granted for the life of the heir in possession is not a contravention, as the heir's

right may cease prior to his death. — *Graham v. Bontine* (Gartmore), 1 Robin. 347 (1840); Aff. 15 S. 711.

177. Although the Act 1685, c. 22, declares that a contravener shall forfeit for himself and his heirs, this only applies to his heirs, where they are declared in the tailzie itself to forfeit, and if this is not declared, the heirs of the contravener may pursue a declarator of irritancy against him. — *Graham v. Bontine* (Gartmore), 1 Robin. 347 (1840); Aff. 15 S. 711.

178. An irritancy committed by selling part of an entailed estate is not purged by re-acquiring the lands through excambion of another part of the entailed estate, which is a second irritancy. — *Graham v. Bontine* (Gartmore), 1 Robin. 347 (1840); Aff. 15 S. 711.

179. Possessing upon a title different from the tailzie (in virtue of a decree in absence reducing the entail), and failure to bear the name and arms, may be purged before decree in a declarator of irritancy (and of reduction reductive of the reduction), on the party finding caution against incumbrances incurred during his fee-simple possession. — *Abernethie v. Forbes* (Balbithan), 1 Robin. 434 (1840); Aff. F. C. 20th June 1837.

See 62, 125, 126, 189—FORFEITURE, 14, 15, 16.

XIV. RECORDING AND MAKING UP TITLES.

180. Question raised but not decided whether an entail made in 1678, and completed by charter and infeftment prior to the Act 1685, is effectual. — *Lord Advocate v. Bayne* (not reported), Lords' Journals, 1759; Appeal Cases.

181. A tailzie made prior to 1685, c. 22, and not recorded, does not debar the heir from granting provisions to younger children. — *Borthwick v. Borthwick* (Overshiels), Cr. & St. 53 (1731); Rev. M. 15556.

182. An heir of tailzie in possession, having made up his titles with only a general reference to the prohibitions, &c., in the original settlement or bond of tailzie (which was prior to the Act 1685, and never recorded), has not power to sell for payment of debts, but the rights of the creditors to affect the lands were reserved. — *Crawford v. Lord Garnock* (Kilbirnie), Cr. & St. 167 (1735); Rev.

183. The Act 1685 applies to tailzies made before its date, and creditors contracting with heirs who do not insert in their retours and infeftments the prohibitions, &c., except by reference to the original tailzie, may affect the estate. — *Lord Garnock v. Earl of Glasgow* (Kilbirnie), Cr. & St. 281 (1740); Aff. *Elchies v. Tailzie*, No. 7.

184. A tailzie executed before the Act 1685 is invalid, unless recorded in the Register of Tailzies, although the charter proceeding on it was so recorded. — *Lord Kinnaird v. Hunter*, 2 P. 97 (1765); Aff. M. 15611.

185. An entail completed by infeftment prior to the Act 1685, but not recorded under it, is void against creditors, but the defect does not entitle the heir in possession to sell for debts incurred since the death of the maker, reserving the question as to the debts incurred by him. — *Earl of Roseberry v. Creditors of Lord Primrose* (Carrington), 3 P. 651 and 654 (1767 and 1770) ; Aff. M. 14019.

186. Debt contracted by an heir of tailzie possessing on a personal title cannot be made to affect the tailzied estate, though the tailzie had neither been registered nor feudalised. — *Denham v. Baillie* (Westshiels), Cr. & St. 113 (1733) ; Rev.

187. Creditors of a former owner adjudging, but not infeft till after the date of infeftment of the heir in possession under an entail unrecorded, cannot compete with him. — *Lord Advocate v. Bayne* (not reported), Lords' Journals, 10th April 1759 ; Appeal Cases.

188. An heir of tailzie though unrecorded, and containing no clause binding the heirs to possess under it alone, cannot alter the order of succession in the tailzie, and if he makes up a title in fee-simple and burdens the estate, he and his representatives are bound to disburden it at the instance of the next heir. — *Duke of Douglas v. Lord Strathnaver* (Rosebank), Cr. & St. 32 (1730) ; Aff. M. 15373.

189. Omission of the restrictions in a general retour does not incur an irritancy. — *Denham v. Stewart* (Westshiels), Cr. & St. 233 (1737) ; Rev. M. 7275.

190. An entail duly feudalised, but unrecorded, is invalid against creditors. — *M'Kenzie v. Urquhart* (Cromarty), Cr. & St. 302 (1741) ; Aff. Elchies *v. Tailzie*, No. 13.

191. A general service as heir of tailzie carries an unexecuted procuratory in the deed of tailzie, as well as the precept contained in a charter obtained by the heir to whom service is taken, and the sasine on the procuratory may properly contain the fetters. — *Maitland v. Forbes* (Pitrichie), Cr. & St. 570 (1754) ; Aff. M. 14431. *Lord Napier v. Livingston* (Westquarter), 2 P. 108 (1765) ; Aff. M. 15409, 15418.

192. The destination being to an institute and his heirs male, whom failing to his heirs whatsoever, a brother takes as substitute on the death of the institute without issue, and may apply to have it recorded before the death of the institute, but after the death of the entailer. — *Lord Napier v. Livingston* (Westquarter), 2 P. 108 (1765) ; Aff. M. 15409, 15418.

193. Production and registration of the charter following on an entail is not registration of the entail. — *Lord Advocate v. Bayne* (not reported), Lords' Journals, 10th April 1759 ; Appeal Cases.

194. An entail being executed in form of a procuratory, the procuratory, and not the charter following on it, is the deed which ought to be

recorded in the Register of Tailzies. — *Irvine v. Earl of Aberdeen (Drum)*, 2 P. 419 (1777); Aff. M. Ap. Tailzie, p. 1, No. 1.

195. An apparent heir executed an entail, the next heir possessed for more than three years on apparency, and his daughter passing by him made up titles to the party last infeft. Held that she was bound by the personal obligation in the entail to convey the lands in virtue of it. — *Carmichael v. Carmichael (Easter Hailes)*, 6 P. 155 (1816); Aff. 16 F. C. 17.

196. An entailor having called his eldest son as institute, reserving his own liferent and power to sell or revoke, and the deed being undelivered, and the institute dying before the entailor, remit to consider whether a substitute should have made up his title by general service to the entailor or to the institute. Opinion of all the Court that he ought to have served to the institute if there had been delivery of the tailzie or an equivalent. By some of the Judges it was held, that if the deed was unrevoked it was equivalent to a delivered deed; but by others, that if there was not actual delivery the course was that the substitute should proceed by declarator of the death of the institute and of his own resulting right. — *Colquhoun v. Colquhoun (Luss)*, 5 W. & S. 32 (1831); 7 S. 200. See Heir, 66.

197. An entail appearing in the Register of Sasines, but not recorded, is void, though made on occasion of marriage. — *Grahame v. Grahame (Balmakewan)*, 5 W. & S. 759 (1831); Aff. 8 S. 231.

198. Two entails of different estates being referred to in one charter and sasine, the clauses identical in each entail being repeated only once, but those which were different being separately set forth, the charter may be construed *applicando singula singulis*, and is sufficient compliance with the Act 1695, and the omission in the charter of the branches of the destination which before its date had become exhausted, is proper and regular. — *Graham v. Bontine (Gartmore)*, 1 Robin. 347 (1840); Aff. 15 S. 711.

199. A purchaser is entitled to expect that he shall find every condition of an entail in each and both of these registers, but it is no objection to the validity of the entail that conditions appear in either register, which, in point of fact, are not binding. — *Graham v. Bontine (Gartmore)*, 1 Robin. 347 (1840); Aff. 15 S. 711.

200. An entail reserving the maker's liferent, and calling his son as institute, is not invalid because described in the petition and interlocutor for recording as an entail in favour of the maker and his heirs male of his body, &c. An error in transcribing the irritant clause in the register, making it read "in case the heir shall fail to neglect or perform the conditions," is not fatal. — *Norton v. Stirling (Renton)*, 2 M'Q. 205 (1855); Aff. 14 D. 944.

201. The original deed creating the entail is that which is to be re-

corded, although it is not such as to enter the feudal progress, and a deed feudalising it, and bearing to be granted in implement of it, need not be recorded. — *Earl of Fife v. Duff* (Carraldston), 4 M'Q. 469 (1863) ; Aff. 24 D. 936.

202. An entail being made by A. calling his eldest son B. as institute, failing whom and the heirs of his body, C. his second son and the heirs of his body, and A. having, after succeeding and making up his title, died without issue ; held that C. took as successor of A. by disposition in the sense of the Succession Duty Act, and was therefore liable to only one per cent. duty. — *Lord Saltoun v. Adv. General*, 3 M'Q. 659 (1860) ; Rev.

See 65—FORFEITURE, 15—HEIR, 66—INFECTMENT, 15—SUPERIOR AND VASSAL, 4.

XV. WORKING OFF BY PRESCRIPTION.

203. Prescription as against a deed of tailzie unrecorded and unfeudalised is not interrupted during the minority of the substitutes. — *Monypenny v. Ayton*, Cr. & St. 649 (1757) ; Rev. M. 10956.

204. A tailzie may be cut off by negative prescription, and the minority of the next substitute does not prevent prescription from running. — *Black v. Gordon* (Kincraigie), 3 P. 317 (1794) ; Aff. Auchindachy v. Grant, M. 10971.

205. Remit to consider how far a title to exclude, set up on positive prescription by an heir of entail in a declarator of contravention brought by a substitute, is involved in the title of the substitute. — *Dalrymple v. Fullerton* (Bargany), 3 P. 631 (1797).

206. Opinion that a substitute of entail is entitled to deduction of minority in computing the years of prescription on a possession alleged to be in contravention of the entail. (Per Lord Thurlow.) — *Dalrymple v. Fullerton* (Bargany), 3 P. 644 (1797).

207. Possession by the heir of line, on apparency, he being also the heir of entail, does not cut off by negative prescription the right of the heirs under the entail, it having been recorded but remaining personal. — *Maxwell v. Welsh* (Scarr), 6 P. 65 (1814) ; Aff.

208. Under a strict entail, recorded, the heirs possessed in apparency for twenty years, then made up titles as heirs of line, and possessed thereon for thirty-two years ; held that a substitute called preferably by the entail is entitled to reduce the fee-simple title. — *Balfour v. Lumsdaine* (Blanerne), 6 P. 150 (1816) ; Aff. 16 P.C. 299.

209. The narrating a tailzie in a deed which alters the order of succession and imposes different restrictions, and upon which charter and sasine and possession for forty years follows, does not prevent the tailzie from being worked off by prescription on the charter and sasine. — *Paterson v. Purves* (Polwarth), 1 S. Ap. 401 (1823) ; Aff.

210. A tailzie, before it was feudalised, having been revoked (under a reserved power) as to all but the entailor's heirs of the body, and cancelled with approbation of the entailor's son, but revived by proving the tenor by a subsequent heir of the body, and such heirs having afterwards failed, so that the heir in possession had both a title in fee-simple and as heir of entail in his person; held that his serving and obtaining infestment as heir of tailzie, and possessing thereon for more than forty years, did not exclude him from setting up his fee-simple title. — *Mackay v. Lord Reay* (Reay), 1 W. & S. 306 (1825); Aff. 2 S. 520.

211. Remit to the Court of Session to review their interlocutors finding that a deed executed in 1742 on the purchase of an estate to be added to lands tailzied in 1721, was an exercise of a power of interjected nomination of substitutes reserved in the tailzie, and was not an alteration in virtue of a power to alter reserved in the tailzie, and that possession on the deed 1721, till the period at which the new series of heirs came to have right, was not a prescriptive title excluding the deed 1742. — *Stewart v. Porterfield* (Duchal), 2 W. & S. 369 (1826); Rem. 1 S. 9.

212. Prescription does not run against a separate deed of nomination unrecorded, made under a power to nominate reserved in an entail, though the estate has been for forty years possessed on the entail, without mention of the deed of nomination. — *Stewart v. Porterfield* (Porterfield), 5 W. & S. 515 (1831); Aff. 8 S. 17.

213. An heir in possession under an entail made a new entail propelling the fee, but also containing new and independent provisions, and not referring to the original entail except for the description of the lands. Held that the second deed was a new entail, but not having been recorded, it was ineffectual, but that possession on it for forty years had worked off the old entail. The heir taking advantage of these defects and selling, is not bound to reinvest the price. Observations of Lord Cottenham against the principle of the Ascog case. — *Montgomerie v. Earl of Eglinton* (Coilsfield), 2 S. Bell, 149 (1843); Aff. 4 D. 425.

See HEIR, 22, 23—PRESCRIPTION, 13.

XVI. BAR UNDER RUTHERFURD ACT.

214. The operation of the 16 and 17 Vict. c. 94, is retrospective on proceedings under the Rutherford Act. — *Kerr v. Marquis of Ailsa*, 1 M'Q. 736 (1854); Aff. 14 D. 864.

215. An heir in possession may effectually bar the entail with the proper consents at the time being, although other nearer heirs may afterwards come into existence. — *Martin v. Kelso*, 2 M'Q. 556 (1857); Aff. 15 D. 950. *See* Forfeiture—Heir, 9.

ERROR OF LAW OR FACT.

1. The claimant of an estate forfeited to the Crown as in possession of an attainted party, having erroneously prosecuted his claim before the Court of Session, which had jurisdiction only when the attainted party was not in possession; and on reversal of their judgment in his favour, the time having expired for instituting a claim before the proper Court, held not entitled to an enlargement of the time. — *Bayne v. Comrs. of Forf. Estates, Robert*. 507 (1725); *Aff.*

2. A cautionary obligation, extended in time by the parties after it had become prescribed, but while they were under the belief that in law it was not yet prescribed, is binding, and an obligation of relief from such obligation is also valid, though granted after the bond was prescribed, and not referring to the prorogation. — *Henderson v. Ramsay*, 5 P. 155 (1806); *Aff.*

3. There is no claim for repetition for money paid under *error juris*, and none for money paid under *error facti*, if the party had full opportunity of learning the truth. — *Wilson v. Sinclair*, 4 W. & S. 398 (1830); *Rev.* 7 S. 401.

4. Opinion that by the law of Scotland there is no right to recover money paid under mistake of law. (Per Lord Brougham.) — *Dixon v. Monkland Canal Co.*, 5 W. & S. 445 (1831); *Aff.* 8 S. 826.

5. A general trustee for creditors having granted to a creditor, selling under a heritable bond, a guarantee of the amount of his debt, on condition of his stopping the sale, after having had an opportunity of examining the bond and sasine, and the sasine being afterwards found void, and the estate insufficient to pay creditors having priority, the trustee is still bound personally by his obligation. — *Grieve v. Wilson*, 6 W. & S. 543 (1833); *Aff.*

6. A compromise and arrangement fairly and honestly entered into under advice of a professional adviser and the opinion of counsel, will not be set aside on the ground that a point of law was overlooked in the case, which, if thought of at the time, might have prevented the party from agreeing to the terms, as making a material difference in his relative situation. — *Stewart v. Stewart, M'L. & R.* 401; 6 Cl. & Fin. 911 (1839); *Aff.* 15 S. 112.

7. Two deeds were executed, the second to provide for the case of the first being found illegal; held that the beneficiary under both, by claiming on the latter, does not abandon his claim under the former, if it is found valid. — *Porterfield v. Corbet*, 1 S. Bell, 476 (1842); *Aff.* 2 D. 573.

8. On a statement of the law agent of deceased party after the funeral, that a certain sum was moveable, the heir in heritage signed a minute

assenting to its being so considered. Held that he was entitled to reduce the minute on the ground of want of consideration, misrepresentation, and essential error, and that an issue might be granted to try that question, before deciding whether in law the sum was moveable or heritable. — *Johnston v. Johnston*, 3 M'Q. 619 (1859); Aff. 19 D. 706.

See ARBITRATION, 18, 22, 23, 24—CONVEYANCING, 13—FRAUD, 5—

HUSBAND AND WIFE, 45, 46—LAW AGENT, 6.

EVIDENCE.

1. The agent of the granter of a deed, being one of the subscribing witnesses, is admissible *cum notâ* to prove its delivery. — *Sawyer v. Earl of March*, Cr. & St. 479 (1750); Rev. M. 16757.

2. Pending a suit in Scotland respecting the legitimacy of a child born in Paris, a charge of fraud was brought against the parent by one of the parties before the criminal tribunals in Paris. Held that they were bound to stop such proceedings and have the charge dismissed; and also in case the principal depositions, &c. made in course of it should not be delivered up by the Paris court, then to produce all copies thereof in their possession. Held that the witnesses examined in Paris before such order were not incapacitated, but to be received *cum notâ*, and none of the proceedings before the court at Paris ought to be admitted in evidence. — *Douglas v. Duke of Hamilton*, 6 P. 763 (1764); Alt. See 16.

3. In a reduction on the ground of fraud and facility from age, the solicitor who drew the deed, and who was agent for the defender in the reduction, is admissible as witness for him to prove the sound mind of the party. — *M'Latchie v. Brand*, 2 P. 312 (1778); Rev. M. 16776.

4. It is incompetent to discredit a witness by evidence of conversations in which he had taken part after his examination. — *De La Motte v. Jardine*, 3 P. 197 (1791); Aff. See 19, and Action, 67.

5. Notes in the alleged debtor's pocket-book, with an account made out by him, held not to be sufficient evidence after his death to prove the debt. — *Waddel v. Waddels*, 3 P. 188 (1790); Aff.

6. A negro slave being objected to as witness, as not being a Christian, he was ordered to be examined upon the articles of his faith. — *Nicolson v. Nicolson*, 3 P. 655 (1771); Aff. M. 12639, 16770.

7. In an action of divorce for adultery directed against the wife, the alleged paramours are admissible witnesses for her. — *Marshall v. Marshall*, 4 P. 72; 7 Br. P.C. 612 (1799); Rev. M. 16787.

8. Receipt of money can be proved only by writ or oath, and therefore a judicial declaration on the fact cannot be called for. — *Macdonald v. Elder*, 5 P. 542 (1811); Aff. See Debt, 2.

9. In order to allow merchant's books to be a *semiplena probatio* they must be regularly kept, and items entered in the margin, or interpolated, are not proved. — *Ivory v. Gourlay*, 4 Dow, 467 (1816); *Rev.*

10. The testimony of an aged person being taken by deposition before a magistrate without authority from the Court, will not be received if objected to, but may be if the objection is waived. — *Towart v. Sellars*, 6 P. 301; 5 Dow, 231 (1817); *Rev.* See 16.

11. It is incompetent to remit to the secretary of the Board of Excise to state what weight is to be given to certain entries in excise books. Copies of entries in such books are admissible in evidence, but not on mere certificate of correctness; they must be proved by some one who has made them, or compared them with the originals. The books of distillers who supply a public-house are not evidence to support a charge for spirits delivered which had been omitted from a settled account. — *Dunbar v. Harvey*, 2 Bligh, 351 (1820); *Rev.*

12. An alleged excerpt from a destroyed deed, which is *ex facie* imperfect and inconsistent, is inadmissible as evidence. — *Forbes v. Wilson*, 1 S. Ap. 249 (1822); *Rev. F.C. 10th June 1818.*

13. Letters between the trustee and the attorneys he employs are evidence against, but not for him. — *Young v. Muir*, 2 S. Ap. 25 (1824); *Rev.*

14. Observations on the impropriety of allowing hearsay evidence, and evidence of the contents of written documents not produced, nor proved to be destroyed. — *Morton v. Hunters*, 4 W. & S. 379 (1830).

15. In a claim to work quarries in a royal park made by the keeper, founded on usage, it is not admissible evidence—1st, That the quarries were worked by other persons not proved to be clothed with the same office of keeper, or with permission of the keeper. 2d, That the books of the town-council of a neighbouring burgh contained entries reserving their right to quarry stones, directing them to be quarried, directing application for leave to carry them away to be made to the keeper or his tenants, or directing payment for them to be made to the keeper. 3d, That the keeper granted leases of the park, reserving right to the quarries. But the only admissible evidence is the books or receipts of the keeper, showing he had received money for the stones quarried, or a series of leases of the quarries in which rent was stipulated to be paid for them. — *Off. of State v. Earl of Haddington*, 5 W. & S. 570 (1831); *Rev.* 8 S. 867.

16. Statements made by a witness in a suit are not evidence in another suit to which the witness is not a party. A statement that a certain individual was present at a meeting as agent for another, though embodied in a formal minute, is not evidence of his agency. (Per Lord Brougham.) — *Gillon v. Mackinlay, and Mackenzie v. Macartney*,

5 *W. & S.* 474, 513 (1831). See Patronage, 8—Presbytery, 2—Executor, 3.

17. In a reduction of a settlement by the alleged heir, a party who also claimed to be heir, but in a different line, held to be a competent witness. — *Ralston v. Rowat*, 6 *W. & S.* 468 ; 1 *Cl. & Fin.* 424 (1833) ; *Rev.* 11 *S.* 451.

18. In an action arising out of alleged fraudulent representations of the value of shares in a company which afterwards became bankrupt ; held that the shareholders in the company were admissible witnesses. — *Syme v. Brown*, 1 *S. & M'L.* 723 ; 3 *Cl. & Fin.* 412 (1835) ; *Aff.* 13 *S.* 407.

19. Evidence cannot be impeached by proof adduced subsequently that a statement, not relevant to the issue but only bearing on the witness's character, was false. Question, Whether it would have been admitted if protest for reprobaters had been made at the time ? — *Innes v. Innes*, 2 *S. & M'L.* 417 (1837) ; *Aff.* 13 *S.* 1059.

20. In an action of nuisance it is incompetent to ask a witness for the defence, in cross-examination, whether he knows of a sum having been paid by the defenders to another party on account of the alleged nuisance, and such question cannot be asked even for the purpose of discrediting the witness. Observed that a bill of exceptions for the refusal to admit a question in examination ought only to be taken when the point in dispute is of great importance. — *Tennant v. Hamilton*, *M'L. & R.* 821 ; 7 *Cl. & Fin.* 122 (1839) ; *Rev.* 1 *D.* 502.

21. A witness is at liberty to refer to a printed copy of a report he has made, when it contains calculations made on the margin by him in pencil, the materials for which exist in his note-book, though not wrought out there. — *Horne v. Mackenzie*, *M'L. & R.* 977 ; 6 *Cl. & Fin.* 628 (1839) ; *Aff.* 16 *S.* 1286. See Proving the Tenor, 5.

22. An account rendered by a mercantile firm being alleged by them to be written on erasure *in essentialibus*, they are bound to prove by their books that it has been altered, otherwise it will stand good against them. — *Fergusson v. Fyffe*, 2 *Robin.* 267 ; 8 *Cl. & Fin.* 121 (1841) ; *Aff.* 16 *S.* 1038.

23. It was not a good objection to a witness that he had an interest in the decision of the question at issue, not having any in the cause itself. — *Wilcox v. Farrell* (or *Wood v. Young*), 6 *S. Bell*, 89 ; 1 *H. L. Ca.* 93 (1847) ; *Rev.* 9 *D.* 766.

24. In a trial as to the liability of a deceased on certain documents, on the ground that his mind was weak when they were granted, entries in his books made by him are admissible to prove his state of mind, though not admissible to prove his non-liability through payments made. A pleading in another action signed by a party is evidence

against him. — *Marianski v. Cairns*, 1 *M'Q.* 212; 1 *Stu.* 1108 (1851); *Aff.* 12 *D.* 1286.

25. If a witness examined on commission is permanently resident abroad, his evidence may be read without proof of his being still abroad, but if he has been only temporarily absent, his continued absence must be proved at the trial. — *Sutton v. Ainslie*, 1 *M'Q.* 299; 1 *Stu.* 702 (1852); *Aff.* 14 *D.* 184.

26. Letters and reports prepared by a mining engineer for the guidance of a party about to institute law proceedings thereon, are privileged as much as a brief for counsel, or a case for opinion. — *Bargaddie Coal Co. v. Wark*, 3 *M'Q.* 467 (1859); *Aff.* 18 *D.* 772.

See COURT OF SESSION, 2—FOREIGN, 28, 30—LANDLORD AND TENANT, 32—PARTNERSHIP, 16—PUBLIC WORKS, 13, 15—STAMP, 3, 4—STATUTE, 4, 6, 9, 14—TRUST (*Constitution of*), and 48, 52—WRITTEN DOCUMENTS.

EXCISE.

1. After a distiller has given notice to the Excise that he has ceased to distil, although his distiller's license has not expired, he must take out a dealer's license before he can dispose of any stock remaining on hand. — *Lord Advocate v. Menzies*, 4 *P.* 92; 8 *Br. P. C.* 164 (1799); *Rev.*

2. On 13th June resolutions were passed imposing a higher duty on spirits; on 29th June the Act 38 Geo. III. c. 92, was passed, imposing them on all spirits found on the first actual survey by excise officers, on or after 13th June in the stock of any distiller. Held (on consulting the English Judges) that the excise officers were entitled, under an order of Council, to enter any distillery after the 13th June, and survey the spirits, and that duty was payable on the amount so ascertained. — *Hume v. Haig*, 4 *P.* 95; 8 *Br. P. C.* 196 (1799); *Rev.*

3. New trial granted in respect to the liability of certain salt manufacturers to excise duties. — *Grier v. Mitchell*, 6 *P.* 1 (1814); *Rev.*

4. An excise officer having exacted interest for arrears of duties, held that whether it belonged to the public or to the officer, the party charged could not recover it back. — *Young v. Leven*, 4 *Dow*, 138 (1816); *Aff.*

See PARTNERSHIP, 27—STATUTE, 20, 21.

EXECUTOR.

1. An executor, after exhaustion of the personal estate, suing the heir for funeral charges, is entitled to recover such as he was himself contractor for, but not such accounts as he paid after they had become

prescribed. An assignation to the whole right of administration carries right to recover costs in a suit respecting the right of confirmation. — *Cockburn v. Hamilton*, Robert. 61 (1713); *Aff. M.* 10343.

2. The expenses of confirming executor ought to come equally out of the whole of the deceased's estate, as well legitim as dead's part. — *Lashley v. Hog*, 4 P. 581 (1804); *Alt.*

3. A testator having appointed his executor universal legatee for the payment of his specified debts, the executor, on intromitting before confirmation, was ordered, on petition by a creditor, to give up an inventory and find caution for the amount before further intromissions. The cautioner is then liable for the whole estate, although no inventory has been made up, and it may be proved against him by an oath of the executor sworn in another action. — *Porteous v. Fordyce*, Robert. 183 (1816); *Aff.* 1715.

4. The partner of a firm in India, in which a deposit was made on special trust, being named executor by the depositor, and proving the will, is answerable for the loss of the funds by the failure of the firm, although a power of attorney had been sent to the firm by the executors in England, and he had left the firm, with their knowledge, before its failure. Held also liable for Indian interest on any balance on settled accounts, or bonds paid to the firm, with allowance for commission on transmission. — *Graham v. Keble*, 6 P. 616; 2 *Dow*, 17; 2 *Bligh*, 126 (1813-26); *Aff.*

5. Notice coming to an executor under a will, in the course of his acting, that another and subsequent will is in existence, does not necessarily imply that all his acts afterwards are illegal, and in any case by the law of Scotland his acts prior to notice are valid. The opposite rule laid down in *Woolley v. Clark*, observed not to be settled law in England. — *Cleland v. Weir*, 6 S. Bell, 402 (1849); *Aff.* 10 D. 199, 924.

6. Under the Act 1617, c. 14, an executor was entitled to one-third of the dead's part, although legacies were given them as such. — *Murray v. Grant*, 1 M'Q. 178; 1 *Stu.* 1069 (1852); *Aff.* 12 D. 201.

7. An executor receiving funds does not discharge himself of liability by handing them over to a co-executor. If trustees or executors leave their trust unexecuted, they cannot resist a claim for accounting on the ground of lapse of time. — *Macpherson v. Macpherson*, 1 M'Q. 243 (1852); *Aff.* 12 D. 486.

See ASSIGNATION, 2—BANK, 5—BONA FIDE POSSESSION, 2—
PRESCRIPTION, 1—TRUST, 23, 36—WILL.

EXECUTRY.—See ACQUIESCENCE, 3—HEIR, 75, 78—HEIR AND
EXECUTOR—HERITABLE AND MOVEABLE—SUCCESSION.

FACTOR.

1. A relative acting in charge of an estate, but not formally as factor, held not liable for arrears nor for more than 3 per cent. interest, but not entitled to costs, as not having kept regular accounts. — *McDouall v. Buchan*, 6 P. 330 ; 5 *Dow*, 127 (1817) ; *Aff.*

2. A factor having delayed to make up the titles of the heiress of an estate, whereby on her death her husband lost the liferent, held not liable in damages, there not being evidence of fraud. — *Thomson v. Somerville*, 6 P. 393 (1818) ; *Rev. F. C.* 19th May 1815.

3. A judicial factor is not bound to account for the back rents of a property which, till a decision of the Court of Session, he had probable cause for believing did not belong to the estate. He must, under all circumstances, account for all interest and profits received by him upon the funds in his charge. A power to appoint sub-factors includes a power to allow them reasonable salary out of the estate. — *Duke of Roxburgh v. Swinton*, 2 S. Ap. 18 (1824) ; *Alt.*

See ACQUIESCENCE, 6—CAUTIONER, 14, 15—CONTRACT, 13, 15—HEIRS, 19—MINOR, 6, 9, 11, 13—PARTNERSHIP, 52—PRINCIPAL AND AGENT—TRUST, 35.

FEE AND LIFERENT.

I. AS BETWEEN HUSBAND AND WIFE, p. 151	II. AS BETWEEN PARENT AND CHILD, p. 152
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I. AS BETWEEN HUSBAND AND WIFE.

1. A disposition by a woman of her estate in her marriage-contract “to the husband in liferent and the heirs of the marriage in fee, whom failing, to the heirs and assignees of the husband,” with reservation of the wife’s liferent, followed by procuratory and precept “to the husband and wife and longest liver in conjunct fee and liferent, and the heirs of the marriage in fee, whom failing, to the husband’s heirs and assignees,” charter and sasine being taken in these latter terms, vests the fee in the husband. — *Douglas v. Montgomerie*, Robert. 99 (1714) ; *Aff. M.* 4223. See 15.

2. A conveyance by the wife in the marriage-contract of her estate to the husband and herself in conjunct fee and liferent, and to the survivor and the heirs of their bodies, without further substitution, gives the fee to the husband, although the wife survives. — *Neilson v. Murray*, Cr. & St. 65 (1732) ; *Aff.*

3. A destination of the wife’s estate in her marriage-contract to her husband and herself in conjunct fee and liferent, and to the sons of the

marriage, whom failing, to her father's heirs male, whom failing, to the heirs female of the marriage, whom failing, to her heirs of any subsequent marriage, whom failing, to the husband and the heirs of his body of any subsequent marriage, whom failing, to the wife's heirs whomsoever, leaves the fee in the wife, and on her death, gives it to her son by the marriage, who may gratuitously dispose of the estate. — *Murray v. Blair*, Cr. & St. 251 (1739); *Aff. Elch. v. Serv. and Conf.* No. 5.

4. A disposition by a husband in a marriage-contract to himself and his wife in conjunct liferent, and to the longest liver of them and their heirs and assignees in fee, vests the fee in the wife on her survivance. — *Forrester v. Macgregor*, 1 S. & M'L. 441 (1835); *Aff.* 9 S. 675.

5. A bond to a natural daughter in liferent, secluding *jus mariti*, and to children *nascituris* in fee, in such proportions as she and her husband might appoint, and failing appointment, equally, and failing issue of the intended marriage, then to the husband in fee, vests the fee in the wife, and on the predecease of the husband and issue, entitles her to payment. Held that she is also entitled to revoke any permission she had given to her husband to invest the money on a different destination. — *Macintosh v. Gordon*, 4 S. Bell, 105 (1845); *Aff.* 4 D. 192.

6. A disposition by husband and wife of the wife's real estate to themselves and the longest liver, whom failing, to a series of substitutes, reserving power to them and the survivor to alter, gives the fee to the husband on survivance, and enables him to alter the destination at pleasure. And the case is not altered in this respect by the wife having before her death executed, under the reserved power, a new deed of nomination of heirs, failing her husband and herself and the longest liver, and at the same time burdening the estate with a sum of L.8000, payable after her death to her husband, his heirs or assignees. — *Scott v. Maxwell*, 1 M'Q. 791 (1854); *Aff.* 12 D. 932. See 8, 10.

See HUSBAND AND WIFE, 40, 59, 64.

II. AS BETWEEN PARENT AND CHILD.

7. A disposition by a father to an infant son in fee, reserving the father's liferent and power to sell, with consent of trustees, for payment of existing debt or for purchase of more convenient lands, which disposition was followed by infestment and possession by the son, and subsequently by a personal deed renouncing the liferent only, effectually divests the father, and vests the fee in the son. — *Comrs. of Forf. Estates v. Drummond, Robert*. 290 (1720); *Aff.*

8. A disposition of heritage by the father of the husband to spouses in conjunct fee and liferent, and to the longest liver, and to the bairns to be begotten between them in fee, gives the fee to the surviving father, although there is issue. — *Allardice v. Smart, Robert*. 399 (1722); *Aff.*

9. A disposition to a father, whom failing, to his son *nominatim* and his heirs male, gives the father the liferent and the son the fee, and consequently he need not serve to his father on his death. — *Hamilton v. Hamilton*, Robert. 493 (1724) ; Rev. M. 14360, 14929.

10. A marriage-contract, in which the husband binds himself to infest his wife in liferent, and the heir male of the marriage in fee in certain lands, leaves the fee in the husband, and gives the heir male only a *spes successionis*, and inhibition used by the latter is not effectual against the posterior onerous creditors of the father. — *Sutherland v. Gordon*, Cr. & St. 493 (1751) ; Aff. M. 4398.

11. A *mortis causa* assignation by a father to his married daughter (mother of children then born) of bonds and sums of money “in liferent, and to the heirs of her body in fee,” being followed with a condition that she should pay all his just debts, and power to her and her foresaids to uplift and receive the money and grant discharges, and do everything which the grantor could in life, vests the fee in the mother. — *Grahams v. Graham*, 2 P. 537 (1780) ; Aff. M. 4277.

12. A disposition of, or a direction in a trust-deed to convey, the estate to the natural son of the disposer in liferent for his liferent use allenary, and to the heirs to be procreated of his body in fee, gives him a liferent only, and gives the fee to the heirs to be born. — *Smith v. Newlands*, 4 P. 43 (1798) ; Aff. M. 4289.

13. A disposition by a father to his son in liferent for his liferent use allenary, and the heirs of his body, failing whom, and failing his heirs arriving at majority or marrying, then to the disposer's daughters in liferent for their liferent use only, and to their children procreated or to be procreated equally among them in fee, gives a liferent only to the disposer's son, and on failure of his issue gives the fee to the children of the daughters. — *Thomson v. Thomson*, 5 P. 654 ; 1 Dow, 417 (1812) ; Aff.

14. A mother having conveyed lands to trustees for herself in liferent, and her children *nominatim* in fee, cannot afterwards alter the deed so as to affect the right vested in the children. — *Turnbells v. Tawse*, 1 W. & S. 80 (1825) ; Rev.

15. An obligation by a lady, in her marriage-contract, to dispoise estates of which she was heir of provision to and in favour of the heir male of the marriage, under reservation of her and her husband's liferent, leaves the fee in her. — *Dewar v. M'Kinnon*, 1 W. & S. 161 (1825) ; Aff. See 1.

16. A declaration that a sum of L.10,000, part of the price of an estate sold to the son-in-law of the vendor, should be “secured to the said son-in-law and his wife (daughter of the vendor) in manner following, viz., the interest of the said sum is to be liferented by the vendee and his wife during their lives, and during the life of the survivor of

them, and the said principal sum to be the property of and divisible amongst the issue of the marriage male and female, as their parents, or the survivor of them, might direct, and in default of issue, as the said daughter of the vendor might direct by will," vests the fee in the issue of said marriage during their parents' lives, and gives them preference over the heirs of the vendor. — *Napier v. Scotts*, 2 W. & S. 550 (1827); Aff. 4 S. 454.

17. In the above case the vendor having died before any part of the price was paid, leaving three heirs portioners, who conveyed the estate, reserving a real burden to the extent of the price; held that on a judicial sale, the price obtained being not equal to this real burden, the interest of the L.10,000 liferented must be divided equally between the other two sisters, as falling under the *jus mariti* of the original vendee, who was liable for the price to the heirs portioners, while the share that would come to his wife fell again under his *jus mariti*, and so was again and again divisible till exhausted. — *Napier v. Gordon*, 5 W. & S. 745 (1831); Aff. 8 S. 357.

18. A father having signed an agreement to sell a piece of land, the price to remain a burden on the land, and a bond for it to be granted to him in liferent and his two sons in fee, and having desired them to sign a postscript declaring their consent that the money should not be called up for eight years, which they did, and the purchaser having entered on the land, though neither the disposition nor the bond was ever executed; held that the fee of the price vested in the sons during their father's life. — *Spence v. Ross*, 3 W. & S. 380; 4 Bligh, N.S. 510 (1829); Aff. 5 S. 17.

19. A conveyance to a father in liferent and to trustees, expressly or by implication, for his children *nascituris* in fee, does not give the father the fee, but preserves it for the children, even although the trust be not formally expressed. — *Mein v. Taylor*, 4 W. & S. 22 (1830); Aff. 5 S. 779. See 12, 14.

20. A conveyance of personal estate to trustees, with directions to invest it for the truster's daughter in liferent only, and to take the fee to themselves as trustees for her children by her existing or any future marriage, equally among them, does not vest the fee in her children until her death. — *Thomson v. Scougall*, 2 S. & M'L. 305 (1835); Aff. 12 S. 910.

21. Under a provision in a trust-deed of a sum to a father "in liferent, and his children equally among them in fee," the fee of the sum is in the father, whether children are in existence or not, the trust being only for payment and not for holding the estate. — *Ralston v. Hamilton*, 4 M'Q. 397 (1862); Aff. 22 D. 1442.

See HEIRS, 19—HERITABLE AND MOVEABLE, 18—PROVISION TO CHILDREN, 21—SUCCESSION DUTIES, 2.

FOREIGN.

I. CONTRACTS,	p. 155	III. ACTIONS ON CONTRACTS AND	
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I. CONTRACTS.

1. Intimation by letter, acknowledged in writing by the debtor, is sufficient in the case of an English bond, executed and assigned in England, but of which all parties were domiciled Scotsmen. — *Gray v. Duke of Hamilton, Robert. 1 (1709); Rev. M. 4453.*

2. Articles of marriage in English form, binding the owner of a Scottish estate to settle fee-simple lands of L.1000 a-year clear value on his son's marriage to the use of his son for life, without impeachment of waste, remainder in part to the son's wife for jointures, remainder to the son in tail male, with other remainders over, and other lands of the value of L.1000 a-year to the use of himself for life, remainder to the son for life without impeachment of waste, remainder to the son in tail male, with remainders over, are sufficiently fulfilled by a conveyance of certain lands by the father to the son and his wife and the longest liver, in conjunct fee and liferent, whom failing, to their heirs male, and of other lands to the son and his heirs male, the whole comprising all the father's estate, he reserving liferent in part, without the conveyance being fenced with the clauses of a strict entail; and although the clear rental of the said lands was less than the stipulated sum, the son may burden it with his father's debts, and may still farther diminish it by granting a power to the father to burden the lands with reasonable provisions to his younger children in satisfaction of their legitim. — *Campbell v. Pollock, Robert. 324 (1720); Rev.*

3. A personal bond, executed in England but in the Scottish form, is valid in Scotland. — *Paterson v. Ogilvie, Robert. 499 (1724); Aff.*

4. Personal debt incurred in England, and not capable of being charged at the instance of the creditor against the debtor's heir there, may be made a ground of affecting the real estate in Scotland. — *Fullerton v. Kinloch, Cr. & St. 265; Aff. M. 4456.*

5. An annuity, constituted by marriage-contract over an estate in Jamaica, is to be construed by the law of Jamaica, and the estate will not be relieved of it by an additional security being, in terms of an obligation in the contract, granted over lands subsequently acquired in Scotland. — *Ogilvie v. Dundas, 2 W. & S. 214 (1826); Rev. M. Discussion, Ap. No. 1.*

6. A contract of insurance, effected in Scotland with the agent residing there of a London company, is a Scottish contract. — *Albion Ins.*

Co. v. Mills, 3 *W. & S.* 218 ; 2 *Bligh*, *N.S.* 519 ; 1 *Dow & Cl.* 342 (1828) ; *Aff.* See 15.

7. English assignees in bankruptcy of a company have not power to authorise a trust-deed by one of the partners in Scotland for payment of the creditors of what was alleged to be a separate concern carried on in Scotland. — *Stein's Assignees v. Brown*, 5 *W. & S.* 47 ; 2 *Dow & Cl.* 171 (1831) ; *Rev.* 7 *S.* 686.

See EXECUTOR, 4—INTEREST, 6, 9—SUCCESSION, 3.

II. WILLS.

8. A party taking benefit under an English will, which directs personal property to be laid out in land, and settled in the same way as directed by a deed of even date respecting heritage in Scotland, but which deed is defective as a conveyance, is not bound to ratify or make good the defective deed. — *Wilson v. Henderson*, 4 *P.* 316 (1802) ; *Rev. M.* 15444.

9. A will made in India, and by a Scotsman domiciled there, is to be construed by the law of England, even as to questions of intention, and if being insufficient to pass heritage in Scotland, it would also not pass real estate, nor raise a question of election as to real estate in England, it will not do so as regards heritable bonds in Scotland. — *Trotter v. Trotter*, 3 *W. & S.* 407 ; 4 *Bligh*, *N. S.* 502 (1829) ; *Aff.* 5 *S.* 78.

10. A deed by a domiciled Scotsman, and valid as to Scotland, but invalid as to England, having conveyed real and personal estate in Scotland, and real estate in England to trustees for division equally among the grantor's children, his heir-at-law cannot elect to take the English estate, and also claim his share under the deed. — *Dundas v. Dundas*, 4 *W. & S.* 460 ; 2 *Dow & Clark*, 349 (1830) ; *Aff.*

11. A valid trust-disposition of heritage containing a reserved power to direct the succession as the truster might direct in writing, though without the solemnities of a deed, was followed by a will in the English form bequeathing the residue of the testator's estate, consisting of heritage in Scotland, but without express reference to the trust-deed. Held that the bequest was a proper exercise of the power, and was effectual as a declaration of trust. — *Brack v. Johnston*, 5 *W. & S.* 61 (1831) ; *Aff.* 6 *S.* 113.

12. A trust-deed validly conveying heritage in Scotland, and directing the trustees to act according to directions contained in a will already executed, or to be executed according to the English form, is to be read as including such directions, and they are accordingly effectual though not probative, on its appearing that they fall under the words of reference. A deed conveying heritage in Scotland cannot be revoked by an improbable deed, though duly executed according to the

law of the place of execution. — *Cameron v. Mackie*, 7 W. & S. 104 (1833); *Aff.* 9 S. 601.

See DEATHBED, 4, 9, 10—HERITABLE AND MOVEABLE, 4—WILL, 5, 7.

III. ACTIONS ON CONTRACTS AND WILLS.

13. An English executor can be sued for the testator's debt only in England, though drawing an annuity from his real estates in Scotland, and the annuity cannot be arrested by the creditor. — *Marchioness Dowager v. Marquis of Annandale, Robert.* 467 (1724); *Rev.*

14. A promissory note, valid by the *lex loci*, granted by a Scot in England, may be sued on in Scotland. — *Brand v. Cumming, Robert.* 511 (1725); *Aff.*

15. A joint-stock company holding lands in Scotland, but having their principal office in England, may be sued in Scotland for damages for failure to re-transfer stock which had been transferred to them in security of a loan, they having agreed to accept payment of the loan in Scotland, and received it there. — *York Buildings Co. v. Haldane, Robert.* 521 (1725); *Aff. M.* 4818. See 6.

16. A suit cannot be maintained in Scotland by an executor creditor against a debtor of the deceased, when the bond is not produced, and when the will was proved in England, and the executor is in England and not made a party. — *Earl of Breadalbane v. Lord Reay, Cr. & St.* 181 (1736); *Rev.*

17. An English executor suing on a bond in Scotland, is not liable to account in the Court of Session for his intromissions in England. — *Hill v. Grant, Cr. & St.* 597 (1755); *Aff. M.* 2661.

18. The Court of Session has jurisdiction against the executors of an English will proved in England, if either the persons of the executors or the effects of the deceased are within their jurisdiction, but not if the sole ground is that the executors are possessed in their private capacity of heritable estate in Scotland. — *Ferguson v. Douglas*, 3 P. 503 (1796); *Rev.*

19. Although the domicile of a deceased party regulates the right of succession of his moveable property, the administration of it must be in that country in which possession of it is legally taken. Consequently the executor of a Scotsman proving the will in England, must administer the personal estate in England under direction of the courts of that country, and cannot be called on by the Court of Session to pay it over to the representatives in Scotland. — *Preston v. Viscount Melville*, 2 Robin. 88; 8 Cl. & Fin. 16 (1841); *Rev.* 16 S. 472.

20. The *lex loci contractus* does not regulate the question of prescription when the debt is sued for in a different country. — *Robertson v. Marquis of Annandale, Cr. & St.* 293 (1740); *Aff.*

21. A Scottish beneficiary suing in Scotland on an English trust-

deed, is subject to the Scottish law of prescription. — *Pollock v. Lockhart*, 2 P. 495 (1779); *Aff. M.* 10702.

22. Debentures in English form by an English company are not cut down by the negative prescription from being ranked on the company's real estates in Scotland, being still valid by the law of England. — *Delvalle v. York Buildings Co.*, 2 P. 98 (1788); *ex parte*; *Rev. M.* 4525.

23. Outlawry in England withholds the Court in Scotland from entertaining an action by the outlaw. — *Liddesdale v. Dobie*, 3 P. 555 (1797); *Aff.*

24. A bond executed in a country where by law it is retained in the register, may be proved in this country by a notarial copy. — *Earl of Traquair v. Burrows*, 6 P. 99 (1815); *Aff.*

25. The costs incurred by a London solicitor in prosecuting a Scottish appeal in the House of Lords, are subject to the triennial prescription in Scotland. — *Campbell v. Stein*, 6 Dow, 117 (1818); *Aff. F.C.* 23d November 1813.

26. A Scottish sequestrated debtor undischarged having gone to Russia and become naturalised there, and his daughter in Scotland having succeeded to his Russian funds; opinion of Lord Gifford, that the question whether she was liable for his debts depended on the Russian law of prescription, applied to the facts of the effect in Scotland of a sequestration on after acquired property. — *Richardson v. Countess of Hadinton*, 2 S. Ap. 406 (1824); *Rem.*

27. A bill drawn and accepted in London is subject to the Scottish prescription when sued on in Scotland. — *Hunter v. Duff*, 6 W. & S. 206 (1832); *Aff. 9 S.* 703.

28. When an English will (of a domiciled Englishman) applies to personal property in Scotland, it is to be construed by English rules of interpretation, but subject to the Scottish law of evidence, and therefore the Court may look at a will which has not been admitted to probate in England, and without requiring the execution to be proved by witnesses, as would be necessary in England. — *Yeats v. Thomson*, 1 S. & M'L. 795; 3 Cl. & Fin. 544 (1835); *Aff. 10 S.* 565.

29. Prescription on a foreign contract is regulated by the *lex fori*, and is not interrupted by a decree obtained in the *locus contractus* in a suit of which the defender had no notice, not being then in the country, and war existing at the time between the two countries, and such decree does not set up a new debt or ground of debt. — *Don v. Lippmann*, 2 S. & M'L. 682; 5 Cl. & Fin. 1 (1837); *Rev. 14 S.* 241.

30. Documents tendered to prove calls made by an English railway company must be good evidence according to the *lex fori*, and evidence is not admissible to prove them to be good evidence according to the

lex loci. — *Bain v. Whitehaven Ry. Co.*, 7 S. Bell, 7913; H. L. Ca. 1 (1850); Aff. 12 D. 829.

See ACTION, 145, 146—SALE.

IV. JUDGMENTS.

31. A creditor obtained judgment on demurrer in England upon an English bond, and on releasing the debtor's bail, took from the debtor an acknowledgment that the judgment should not be thereby released. The debtor having afterwards succeeded to an estate in Scotland, the creditor sued in the Court of Session on the English judgment, the acknowledgment of it in the release of the bail, and the bond itself. Held that the acknowledgment did not exclude objections against the judgment, and that the judgment could only be sustained on proof of the facts on which the English action had been brought, the confession of them by pleading in demurrer not being sufficient. — *Goddard v. Swinton, Robert*. 162 (1715); Aff. M. 6445.

32. Condemnation of a vessel by a foreign Admiralty Court is *res judicata*, and a conclusive plea against a claim of damages against the captors. — *Hamilton v. Dutch East Ind. Co.*, Cr. & St. 69; 8 Br. P.C. 264 (1732); Aff. M. 4548.

33. In an action brought by Scotsmen against an Englishman in the Court of Queen's Bench, judgment was given for the defendant with costs. He sued the plaintiffs in the Court of Session for the costs, but that Court sustained a defence of the inequity of the judgment. The House of Lords *ex parte* repelled the defence, and held that the Court of Session was bound to give decree for the costs, with expenses. — *Wilson v. Burnton*, 2 P. 11 (1758); Rev. M. 4549.

34. The Stat. 5 Geo. II. c. 30, § 7, enacts that all bankrupts surrendering under it should be discharged from all debts owing before bankruptcy, and the certificate by the Lord Chancellor should be sufficient evidence, unless the plaintiff could prove it was obtained unfairly, or make appear any concealment by the bankrupt. Held that this discharge is pleadable in Scotland as well as in England, and that non-disclosure of house property belonging to the bankrupt's father, to which he was heir-at-law, but which was only worth L.50, was not fraudulent concealment sufficient to deprive him of the benefit of the act. — *Cathcart v. Blackwood*, 2 P. 100 (1765); Rev. M. 4579.

35. The judgment of a foreign Court in an action properly brought in it "ought to be received in other countries as evidence *prima facie*, and it lies on the defendant to impeach the justice thereof, or to show the same to have been irregularly obtained." — *Sinclair v. Fraser*, 2 P. 253 (1771); Rev. M. 4542.

36. An indictment for perjury in England being preferred by a

Scotsman against another Scotsman, and being found by a grand jury, and warrant issued thereon by Lord Mansfield to arrest the defendant, the Court of Session held entitled to give heavy damages against the plaintiff on proof that the charge of perjury was groundless and oppressive. — *Liddesdale v. Dobie*, 3 P. 555 (1797) ; *Aff.*

37. The heir-at-law of a domiciled Englishman who was proprietor of an estate in Scotland over which an heritable debt was constituted, being also administrator of his ancestor's personal estate in England, claimed in the Prerogative Court of Canterbury that the heritable debt should (as by the law of England) be paid out of the personal estate in England, and the claim was allowed by that Court. Held that this decision did not form *res judicata* against an action of relief brought in Scotland against the heir by the next of kin, and that they had right to relief against him of their share of the sum so applied in payment of the heritable debt. — *Drummond v. Drummond*, 4 P. 66 ; 6 Br. P.C. 601 (1799) ; *Aff. M.* 4478.

38. A commission of bankruptcy in England vests in the assignees the bankrupt's personal estate in Scotland without intimation. It did not vest the real estate only because at that time it did not affect the real estate in England. — *Selkraig v. Davies*, 2 Dow, 230 (1813) ; *Aff.*

39. A judgment of an American court respecting a legacy left to a Scotsman by a domiciled American, is, if the parties have been properly before it, or had a sufficient opportunity of being heard, to be accepted in this country as settling the question, and not to be overruled by the contrary opinions of American or English lawyers. — *Brown's Trs. v. Brown*, 4 W. & S. 28 ; 4 Bligh, N.S. 569 (1830) ; *Aff.* 4 S. 108.

See BANKRUPTCY, 26—BELLIGERENT, 4—EVIDENCE, 2.

FORFEITURE.

1. A private Act of the Parliament of Scotland, in 1672, having directed that a forfeited estate should belong to the son of the forfeitor, reserving to the widow her claims, the son and not the widow is entitled to sue for payment of a debt which had been assigned to her by a post-nuptial deed as a provision. Held further by Court of Session, that payments made by a *de facto* government, such as that of Cromwell, in liquidation of *bonâ fide* debts, though out of private funds, do not fall under a statute of restitution. Private Acts of the Parliament of Scotland were of the nature of decrees of a Court, and appeals lay to Parliament from the Court of Session. — *Wallace v. Hope*, Robert. 91 (1714) ; *Aff.* See Landlord and Tenant, 27.

2. Case on the statutes passed in reference to the rebellion of 1815. — Lord Lovat *v.* Mackenzie, Robert. 241 (1719) ; Rev. 5 Br. Sup. 12.

1 Geo. I. c. 20 : " If any subject of Great Britain holding lands or tenements of a subject-superior in Scotland, has been or shall be guilty of such high treason or treasons, every such offender who shall be thereof duly convicted and attainted, shall be liable to the pains, penalties, and forfeitures of high treason, and his lands or tenements held of any subject-superior in Scotland, shall recognise and return into the hands of the superior, and the property shall be, and is thereby consolidated with the superiority, in the same manner as if the same lands or tenements had been by the vassal resigned into the hands of his superior *ad perpetuam remanentiam*."

3. On forfeiture of a mill to the superior under the above statute, the thirlage of lands held by the same vassal of a different superior does not pass with the mill. — *Comrs. of Forf. Estates v. Duke of Hamilton*, Robert. 274 (1720) ; Rev.

4. Held that a disponent infest base of the disponent, but holding also a procuratory of resignation for obtaining entry with the disponent's superior, was not a vassal of the disponent in the sense of the above statute. — *Comrs. of Forf. Estates v. Grierson*, Robert. 298 (1720) ; Rev.

5. Lands of an attainted person, held of a superior attainted at the same date, who was vassal to another subject-superior, do not fall to this highest subject-superior, but to the Crown. — *Comrs. of Forf. Estates v. Mackenzie*, Robert. 335 (1720) ; Rev.

6. The disloyalty of the subject-superior might be alleged, and two days was not enough to allow for the proof of disloyalty. — *Comrs. of Forf. Estates v. Stewart*, Robert. 337 (1720) ; Rev.

1 Geo. I. c. 20 : " If any of his Majesty's subjects of Great Britain having lands or tenements in Scotland in property or superiority, shall be guilty of high treason, every such offender who shall be thereof duly convicted and attainted, shall be liable to the pains, penalties, and forfeitures for high treason, and every vassal and vassals in Scotland, who should continue peaceable and in dutiful allegiance to his Majesty, holding lands or tenements of any such offender who held such lands or tenements immediately of the Crown, shall be vested and seized, and are hereby ordained to hold the said lands or tenements of his Majesty, his heirs or successors, in fee and heritage for ever, by such manner of holding as any such offender held such lands or tenements of the Crown at the time of the attainder of any such offender."

7. Vassals of kirk lands who, although by the Acts 1633, c. 14, and 1661, c. 53, the superiority of them had been re-annexed to the Crown, had continued to pay their feu-duties to a subject-superior, held entitled to hold them, on his attainder, of the Crown, but paying the feu-duties to the Crown which they had paid to the subject-superior. — *Comrs. of Forf. Estates v. Ogilvie*, Robert. 331 (1720) ; Rev. See Coal, 1.

8. Question whether the Stat. 1 Geo. I. c. 20, was limited to the occasion of the rebellion of 1715. A disposition held onerous under the Stat. of 20 Geo. II. — *Lord Advocate v. Lord Boyd*, Cr. & St. 498 (1751); M. 14768.

9. A disposition (on which sasine had been taken) granted by a trustee uninfest, without consent of the beneficiary under the trust, divests the beneficiary so as to prevent forfeiture of the lands on his attainder. — *Comrs. of Forf. Estates v. Hog, Robert*. 341 (1721); *Aff.*

10. An agreement to sell lands, followed by a disposition and receipt of the purchase-money and possession by the purchaser, though without taking infestment, divests the vendor, and prevents the forfeiture on his subsequent attainder. — *Comrs. of Forf. Estates v. Stewart, Robert*. 342 and 345 (1721); *Aff.*

11. The Act 1690, c. 33, enacts "That all estates forfeited shall be subject to all real actions and claims against the same to all true and lawful creditors, whether personal or real." A personal bond, unregistered, except as being included in the list of debts due to the creditor, on confirmation of his executor, forms a valid claim for the creditor under the act, against the real estate on the debtor's attainder. And the Stat. 1 Geo. I. c. 20, enacts "That no conviction or attainder shall exclude the right or diligence of any creditor remaining peaceable and dutiful for security or payment of any true, just, and lawful debt contracted before the commission of the crime." Held that it is not necessary for the creditor to prove that he remained peaceable. — *Paterson v. Comrs. of Forf. Estates, Robert*. 349 (1721); *Rev.*

12. The estate of a person attainted is liable for sums necessary for his maintenance and defence prior to trial, although the attainder draws back to an antecedent period. — *Comrs. of Forf. Estates v. Stevenson, Robert*. 518 (1725); *Aff.*

13. On forfeiture for treason, the estate and rights which were in the attainted person in trust only are not forfeited, and he may subsequently execute deeds in execution of the trust. — *Lord Lovat v. Mackenzie, Robert*. 607 (1727); *Aff.*

14. A tailzie prohibiting treasonable deeds, and irritating in case of treason only the right of the committer, but not of the heirs of his body, does not prevent forfeiture of the estate on attainder during the whole time that any heirs of the body of the party attainted should be in existence, and also whenever the succession should open to the heirs and assignees of the attainted heir. Declaration that the heirs of entail not being of the body of the attainted party, might apply when the succession should open to them, to the Court of Session for their rights. Attainder overrides any prior irritancy incurred by the party attainted not ascertained by declarator before attainder. English Judges

consulted. — *Lord Advocate v. Gordon*, Cr. & St. 508 (1751); *Rev. M.* 4728.

15. Under a destination in a deed of tailzie to the granter and the heirs male of his body, the second son does not take as substitute on the attainder of his elder brother. A second deed in which the second son was made a substitute, was in this case held bad, as being unrecorded, and containing the prohibitions, &c., only by reference. — *Mercer v. Lord Advocate*, Cr. & St. 538 (1753); *Aff. Elchies v. Tailzie*, No. 47.

16. A tailzied estate being forfeited by attainder of the heir in possession for his life and the lives of the heirs of his body, when the succession would in the ordinary course have opened to his sons born abroad after the attainder, who, being consequently aliens, would be incapable of taking it, the right devolves at once upon the next heir not being of the body of the attainted party. Opinion of English Judges taken. — *Gordon v. Lord Advocate*, Cr. & St. 558 (1754); *Rev. M.* 4737. See *Heir*, 9.

17. The son of an attainted party being restored to the estate, Question, Whether he is bound by the deeds or warrandice of his father prior to attainder. — *Duff v. Fraser*, 5 W. & S. 57 (1831); *Aff.* 8 S. 14.

See COAL, 1, 4—ERROR OF LAW, 1—PAPIST, 1—STATUTE (*Penal*)—
SUPERIOR AND VASSAL, 27.

FRAUD.

1. A conveyance to an adjudger in possession, obtained from the debtor (who was in prison) for an inadequate price, set aside at the instance of the son of the vendor, the sums actually paid, with interest, being charged on the estate. — *Gordon v. Crauford*, Cr. & St. 47 (1730); *Rev.*

2. Reduction of a deed obtained for inadequate consideration by a creditor who was using an accumulation of diligence, the debtor being in great penury, and of facile disposition. — *Fergusson v. Maitland*, Cr. & St. 73 (1732); *Aff. M.* 4956.

3. A lease being reduced by the judicial factor for the lessor, a company, as granted by fraud on the part of the managers of the estate, and the lessee being a participator in the fraud, no claim for damages lies at his instance against the company under the warrandice in the lease. — *Plaskett v. Stewart*, 4 P. 214 (1801); *Rev.*

4. Although fraud may be made the ground of action after any lapse of time, yet lapse of time will afford a strong presumption against the allegation. — *Irvine v. Kirkpatrick*, 7 S. Bell, 186 (1850); *Rev.* 10 D. 367.

5. A variety of conjectural estimates, on which a family arrangement was based (observed, however, not to be properly of that nature, for the parties were on bad terms), held not to amount to fraud, although, in the circumstances, they were long afterwards found to be not correct. Observations on the necessity of strict accuracy in pleading misrepresentation or concealment. — *Irvine v. Kirkpatrick*, 7 *S. Bell*, 186 (1850); *Rev. 10 D. 367*.

6. A personal action of damages against a bank director for fraud, transmits against representatives in so far as they have assets. Opinion of Lord Cranworth, that it is unfortunate such is not also the rule in England. — *Davidson v. Tulloch*, 3 *M'Q.* 783 (1860); *Aff. 20 D. 1045*. But see *Superior and Vassal*, 4.

See ARBITRATION, 5—BANKRUPTCY, 13, 14, 18, 19—HUSBAND AND WIFE, 42—MINOR, 1—PERSONAL CAPACITY—PRESCRIPTION, 16—REDUCTION, 5, 6, 10—TRUST, 24, 25—WRONGOUS IMPRISONMENT, 4.

GAME.

1. There is no right in the public, though qualified, to enter waste lands without the permission of the proprietor, for the purpose of sporting. — *Livingstone v. Earl of Breadalbane*, 3 *P.* 221 (1791); *Aff. M. 4999*.

2. Interdict refused against the Duke of Atholl hunting on certain grounds, being his property, and over which his right to hunt had been established by a decree arbitral, while the servitude of pasturage in them was established to be in the complainer; there being no allegation that the right of hunting was exercised invidiously. The Stat. 1 Geo. I. c. 54, does not apply to deer hunting where there is not an assemblage of numerous persons. The holder of the servitude of pasture is not entitled to burn the heather. — *Robertson v. Duke of Atholl*, 4 *P.* 54, 6 *P.* 108, and 6 *P.* 135 (1798, 1815); *Aff.*

3. The owner of land adjoining to, and having right to a common, may drive deer off it to his own ground, in order to prevent another owner of the common killing them there. — *Robertson v. Duke of Atholl*, 6 *P.* 72 (1814); *Aff. F.C. 22d May 1810*.

4. A right of hunting and fowling is not a predial servitude, and cannot be carried under the clause of parts and pertinents, and if given in the tenendas of a charter only, but not in the dispositive clause, it is inoperative. Observations on the inconvenience of remitting on appeals. — *Farquharson v. Earl of Aboyne*, 6 *P.* 380 (1818); *Aff. F.C. 16th November 1814*.

5. A right of fowling and fishing may be given by express grant,

and if so given, it may be communicated to the friends and servants of the grantee, but it must be exercised so as not to injure the right of fowling, &c., remaining in the owner of the land. — *Earl of Aboyne v. Innes*, 6 P. 444 (1819); *Aff. F.C. 22d June 1813.*

See SERVITUDE.

GUARANTEE.

1. In an action on a guarantee two defences were made—1st, That it was for an individual and not for a company of which he was a partner, and by the bankruptcy of which the loss was incurred. 2d, That it was delivered to a third party for transmission to the grantee, and was recalled before actual delivery to him. Defences sustained. — *Douglass v. Grant*, 2 P. 351 (1774); *Aff.*

2. Bills given by a company to a guarantor for them, but not endorsed, and returned by him to one of the partners as an individual, to be kept for the guarantor, may be recovered by the guarantor on the company's bankruptcy in preference to their creditors. — *M'Dowal v. Annand*, 2 P. 387 (1776); *Rev.*

3. A letter of guarantee of payment, both of past and future mercantile transactions, is a document *in re mercatoria*, and valid though not probative. — *Wright v. Paterson*, 6 P. 38 (1814); *Aff. F.C. 31st January 1810.*

4. A guarantee, with assignation in security, being withdrawn before it is accepted, and a different one substituted, the former cannot be acted on. — *Grant v. Campbell*, 6 Dow, 239 (1818); *Rev.*

5. Circumstances in which a guarantor for a bill delivered but not endorsed, held to be liable for the amount, and that fraud and not error must be averred to relieve the guarantor. — *Mathie v. Muir*, 2 S. Ap. 97 (1824); *Aff.*

6. A guarantee by A. to indemnify B. against any liability to C., does not give C. any right to proceed against A. in respect of B.'s debt. — *Ewing v. Burns*, M'L. & R. 435 (1839); *Rev. 15 S. 936.*

7. A letter guaranteeing payment of the sum contained in a bond, on condition of having the bond assigned to the guarantor on making payment, is not a cautionary but a principal obligation, and does not fall within the septennial prescription. — *Wilson v. Tait*, 1 Robin. 137 (1840); *Aff. 15 S. 221.*

See CAUTIONER.

HEIRS.

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I. DESTINATION TO HEIRS.

1. A simple destination may be altered by a gratuitous settlement, but such alteration, though effected by a mutual contract between father and son, may, while not followed by infestment, be revoked by both, or if by a deed of tailzie containing a power of revocation, by the father alone after the son's death. — *Hamilton v. Hamiltons*, Robert. 493 (1724) ; Rev. M. 14360, 14929.

2. Neither a clause of return in a marriage-contract, nor a gratuitous destination unfenced, nor a destination in a marriage-contract (as regards others than the heirs of the marriage), prevents an alteration in the destination of the estate by an heir succeeding — *Marquis of Clydesdale v. Earl of Dundonald*, Robert. 564 (1726) ; Aff. M. 1262.

3. A disposition to a son and his heirs male, in which the son is infest either base or publicly, although the sasine is not duly registered, and although the disposition contains a clause of return failing heirs male of the son, and reserves the father's liferent in the lands, and power to sell and dispose thereof, and to charge the same with debts without the son's consent, prevents the father, after the son's death leaving an heir male, from gratuitously conveying the lands on a new destination ; and the title on such new destination cannot be fortified by infestment and prescription in the hands of an heir holding under both titles, so as to take the lands out of the *hereditas jacens* of the son on the succession diverging. — *Marquis of Clydesdale v. Earl of Dundonald*, Robert. 564 (1726) ; Aff. M. 1267.

4. A person cannot on deathbed, nor in minority with consent of his curators, gratuitously alter the destination of his estate in an unregistered bond of tailzie. — *Marquis of Clydesdale v. Earl of Dundonald*, Robert. 564 (1726) ; Aff. M. 1267.

5. A *mortis causa* conveyance of all lands that should belong to the granter at his death in favour of his brother and his heirs whatsoever, does not apply to the estate of the brother, which, on his predecease, came to the granter of the deed under a destination to heirs male, which was not specially altered by any deed made after his succession. — *Mearns v. Farquharson*, 6 P. 724 (1759) ; Aff. M. 2290. See *Deathbed*, 19.

6. A brother having gratuitously disposed his estate away from his own sisters and heirs general, and the disponee being infest, absolutor

in an adjudication on a trust-bond granted by the sister, on the ground of a renunciation executed by her, forms a bar as *res judicata* against a reduction of the disposition brought by her son, and the son is bound by her renunciation, although in making up his title he would have passed her by. — *Gordon v. Ogilvie*, 2 P. 61 (1762) ; Aff. M. 14070.

7. Adjudications being purchased by the owner of the estate, which stood destined to heirs male, and the title to them being taken to heirs whatsoever, they do not, on his death, pass to his heirs of line, but descend to the heir male who takes the estate. — *Burnet v. Burnet*, 2 P. 122 (1766) ; Aff.

8. A destination with prohibitory, resolute, and irritant clauses against altering the order of succession, does not bar an heir taking under it from executing gratuitously a new destination passing over his eldest son, who would have succeeded under the original destination, but who is a lunatic, but not otherwise altering the order of succession. — *Wedderburn v. Halket*, 2 P. 231 (1770) ; Rev. M. 15416.

9. A sale of an estate by the proprietor infert, as heir of provision of a party attainted, cannot be set aside on the ground that, after he had made up his titles as nearest heir under the destination, an heir still nearer was born. — *M'Kinnon v. Macdonald*, 2 P. 252 (1771) ; Aff. M. 5279. See Entail, 215.

10. A post-nuptial contract of marriage settled the husband's estate on the heirs male, whom failing, on the heirs female, with power, if more than one daughter, to settle the estate on any one. There was only a daughter of the marriage, and the father settled the estate on her second and third sons. Held that this deed was reducible by her eldest son, as exceeding the powers reserved in the contract. — *Cunyngham v. Cunyngham*, 2 P. 434 (1777) ; Aff. M. Clause, Ap. No. 1.

11. A deed revoking all prior settlements of an estate, and declaring that it is executed in order that, on failure of the revoker's heirs male and female of his body, the estate should descend according to the ancient investitures, is not a deed of settlement, and the mention of heirs female has no effect on the question whether heirs female succeed or not. — *Duke of Hamilton v. Douglas*, 2 P. 449 (1779) ; Aff. M. 4358.

12. The heir of a marriage taking under a post-nuptial destination not fenced by prohibitory clauses, may gratuitously alter the succession. — *Whitefoord v. Whitefoord*, 3 P. 101 (1788) ; Aff.

13. An investiture of an estate may be competently changed by deeds intended primarily to operate only for the creation of votes. — *Rose v. Rose*, 3 P. 66 (1787) ; Aff. M. 14955.

14. A charter, though obtained for political purposes, is effectual to change the destination of the estate. — *Cathcart v. Earl of Cassillis*, 1 W. & S. 239 (1825) ; Aff. M. 14447. See Trust, 5.

15. A description of lands being altered in a crown charter, following a service, and declared to contain certain other lands, the description is not binding on third parties. — *Stirling v. Alexander*, 1 S. Ap. 482 (1823); Aff. See Prescription, 17—Property, 9.

16. A charter, if disconform to its warrants, does not alter the destination, and the words heirs male may be read as if heirs male of the body. — *Drummond v. Drummond*, 3 P. 557 (1797); Aff. M. 6936.

17. In a deed granting a liferent of part of his estate, the grantor used the words, “and I do recommend to A. who is heir first appointed to succeed me,” but without dispositive words. Held that these words were not a nomination of A. as heir. — *Mercer v. Ogilvie*, 3 P. 434 (1796); Aff. M. 3336.

18. An heir cannot challenge the conveyance of his ancestor when, by the destination of the estate it set aside, there are nearer heirs. — *M’Callum v. Campbell*, 4 P. 32 (1798); Aff. M. 16135.

19. A service as heir of line does not alter a destination contained in a disposition by the ancestor, but it may be altered by a charter expedite by the party who has served on a conveyance to a trustee, and reconveyance by him in favour of heirs whatsoever. A disposition to a daughter in liferent and her heirs *nascituris* in fee, gives her the fee. A general factory gives power to serve heir. — *Molle v. Riddell*, 6 P. (1816); Aff. F. C. 13th Dec. 1811.

20. Under a destination in a post-nuptial contract of marriage to the heirs male of that or any other marriage, whom failing, to the heirs female of the marriage, an only daughter may discharge her right of succession after her marriage, but before majority and in her father’s life, although inhibition has been used by the trustees of the contract. An entail held cut off by positive and negative prescription. — *Majendie v. Carruthers*, 6 P. 597; 4 Dow, 392; 2 Bligh, 692 (1820); Aff. F. C. 16th Dec. 1819. See Husband and Wife, 34.

21. Under a clause in a marriage-contract, providing that if the heir called to the lady’s estate should succeed to the husband’s, the former estate should devolve to the second son, it is competent for the heir in possession of the former, before the case for devolution arises, to enter into an onerous contract resettling the estate without reference to the clause of devolution, and on that being done, the clause of devolution will not take effect. — *Hastings v. Marquis of Hastings* (Rowallan), 6 S. Bell, 30 (1837); Aff. 7 D. 1. See Entail, 57.

See ENTAIL—PERSONAL CAPACITY, 2.

Alteration by Prescription.

22. Where a party has unrestricted right to two titles to an estate, one as heir under a marriage-contract, the other as heir of investiture,

he may adopt either, and deal with the estate in virtue thereof without challenge from the heirs of the other investiture. — *Edgar v. Maxwell*, Cr. & St. 334 (1742) ; Aff. M. 3089. See 3—Prescription, 13, 14.

23. Special services as heirs of line, for a period above forty years, do not work off a destination in the original charter to heirs male or female without division, and therefore heirs portioners are excluded on the succession opening to daughters. — *Durham v. Durham*, 5 P. 482 (1811) ; Aff. M. 11220.

II. DESCRIPTION OF HEIRS.

24. The words “eldest heir female of the body,” signify the son of the daughter of the eldest son, and not the daughter of the maker of the destination, nor the daughter of the last heir male who had taken under the prior substitutions. — *Dalrymple v. Hope*, Cr. & St. 237 (Bargany) (1739) ; *Rev. Elchies v. Provision & Heirs*, No. 2.

25. The son of a daughter is not an “heir female,” if the deed obviously intends the words “heir female” to be synonymous with daughter only. — *Forbes v. Skene*, Cr. & St. 628 (1757) ; Aff.

26. A destination in the settlement of an estate to the settlor's sister in liferent, and her son by a first marriage, and to his heirs and assignees in fee, whom failing, to her son by a second marriage, and his heirs and assignees, carries the estate to the heirs of line of the son by the first marriage, on failure of the heirs of his body, in preference to the son by the second marriage. — *Chatto v. Baillie*, 2 P. 243 (1770) ; *Rev. M.* 14941.

27. The heir of line is called under a destination made by an unlimited *fiar* to heirs and assignees whatsoever, although the existing investitures were to heirs male. — *Duke of Hamilton v. Douglas*, 2 P. 449 (1779) ; Aff. M. 4358, 12350.

28. Parole evidence to interpret a destination to “heirs and assignees whatsoever” rejected. — *Duke of Hamilton v. Douglas*, 2 P. 449 (1779) ; Aff. M. 4358, 12350.

29. The words “heirs male” have a strict technical signification, which is not to be extended by apparent, but not necessary, evidence of being used in a different sense. — *Hay v. Hay*, 3 P. 142 (1789) ; Aff. M. 2315.

30. Under a substitution “to the eldest daughter of the said A., without division, and their heirs male, whom all failing, and their said heirs male, to our nearest and lawful heir male whatsoever,” the heir male of the body of a third daughter takes, on the failure of heirs male of the bodies of the two elder daughters, before their heirs male in general, and before the final substitution comes into operation. But the heirs female of a daughter are not included in the word daughter. Obser-

uations on case of *Hay v. Hay* (No. 29). — *Ker v. Innes* (Roxburgh), 5 P. 320 (1810), and 579 (1812); *Aff. M. Tailzie*, Ap. 1, No. 13.

31. Terms of a destination and clause of devolution under which it was held that the estate passed to a second son of the elder brother of the last holder, rather than to the eldest son of the same brother, so as to devolve on his second son. — *Marquis of Bute v. Wortley*, 4 P. 450 (1803); *Aff.*

32. A provision to “daughters and heirs female, one or more,” is payable to an only daughter, although she does not succeed as heir female. — *Watson v. Glass*, 6 P. 681 (1744); *Aff. M.* 2306.

33. A destination to heirs male held effectual, although in certain events the terms in which it was conceived might lead to contradictory conclusions. — *Murray v. Carlyle*, 6 P. 780 (1770); *Aff.*

34. Under a destination to “A., the heirs male or eldest heir female, lawfully to be procreated of his body,” the daughter of A.’s eldest son takes before A.’s second son. — *Leslie v. Leslie*, 6 P. 792 (1774); *Aff.*

35. A destination in a marriage-contract to the heir male of the marriage, and to his heirs and assignees whomsoever in fee, whom failing, to the heir male of a second marriage, and the heirs of his body, whom failing, to the heir female or eldest daughter of the marriage and the heirs of her body, the eldest daughter always succeeding without division, carries the estate, on the death of the only son of the marriage after his succession, to his sisters as his heirs portioners, and not to the eldest sister as substituted to his heirs whomsoever. — *Stewart v. Stewarts*, 2 S. Ap. 149 (1824); *Aff. F. C.* 5th July 1821.

36. A word of fixed import in the dispositive clause will not be revoked by a word of flexible import in the procuratory, and thus the word “descendants” in the latter will not let in heirs female, when the destination is to “heirs male” in the former. — *Grahame v. Grahame*, 1 W. & S. 354 (1825); *Aff.*

37. Under a destination (the settlor having only three daughters, A., B., and C.) to the eldest son of A. living at his decease, whom failing, to the eldest son of B., whom failing, to the eldest son of C., whom failing, to the second son of A., of B., and of C., whom failing, to the heirs male of A., of B., and of C., in the same order; the fourth son of A. takes before the third son of B., firstly, because he has become the eldest son at the time of the succession opening, and, secondly, because the heirs male of the eldest are preferred before the third sons of the younger, in the terms of the deed. — *Shepherd v. Grant*, 3 S. & M’L. 255 (1838); *Aff.* 15 S. 173.

38. Under a destination to “the heirs male of the body and the heirs whatsoever of the body of the said heirs male, whom failing, to the heirs female of the body,” the heirs whatsoever of the body of the first

heir male take before the second heir male. (Per Lord Cottenham) — It would have been different if “whom failing” had been used instead of “and.” — *Lockhart v. Macdonald*, 1 S. Bell, 202 (1842); Aff. 2 D. 377.

39. Trustees of a *mortis causa* settlement being directed to convey the residue, real and personal, to A., her heirs and assignees, and by a codicil the testator having “disponed and bequeathed B. as successor to A.,” held that the fee vested in A. with a substitution only in favour of B. — *O'Reilly v. Baroness Sempill*, 2 M'Q. 288 (1855); Aff. 15 D. 789.

See PEER, 2, 3.

III. REVOCATION OF DISPOSITION.

40. In an action by a widow against her father-in-law for exhibition of a disposition he had granted to her husband, on a reference to oath he deponed that he had granted it when in prison under the Test Acts, and with a view to save his estate from forfeiture, and that he had delivered it to his wife to be kept for use, if required, and had cancelled it and the sasine thereon before leaving prison; held that the cancelling was warrantable and the qualifications of the oath admissible. — *Muirhead v. Muirhead, Robert*. 4 (1809); Aff. M. 11504. See Proving the Tenor, 6.

41. A disposition to a son in liferent and to his second son in fee, on the narrative that the son had agreed to pay off a debt on the estate, is not made void by the fact that the debt is extinguished by the creditor's intromission with the rents. — *Heron v. Heron*, 2 P. 189 (1770); Rev.

42. The heritable and moveable estate being conveyed by deed of settlement to the settlor and the heirs of his body, whom failing, to certain substitutes, with clause dispensing with delivery, in so far as the deed might be unrevoked, a subsequent marriage-contract by the settlor, in which his estate is settled on the eldest son of the marriage, does not revoke the original settlement, and on the predecease of the only child of the marriage, the estate goes according to the original to it. Neither does the sale of part of the estate included in it amount to revocation as to the rest. — *Allan v. Sinclair*, 2 P. 403 (1776); Aff.

43. A *mortis causa* disposition of heritage in Scotland, containing a power to alter and to nominate heirs by any writing under the granter's hand, is not revoked by a will executed in the English form in England, revoking all other wills and testaments, nor by a deed of entail also executed in England, but invalid to convey heritage, by which the estate was conveyed to a different series of heirs. A deed of nomination is ineffectual unless it refer to the deed which gives the power to nominate, and a reserved power to alter is a power only to dispoise anew, and not to engraft alterations on the original deed.

(Per Lord Thurlow.) — *Wilson v. Henderson*, 4 P. 316 (1802); *Rev. M.* 15444.

44. A reserved power to alter will not authorise an alteration by an improbativ deed. — *Wilson v. Henderson*, 4 P. 316 (1802); *Rev. M.* 15444.

45. A conveyance of heritage in Scotland cannot be revoked by a deed not executed according to the law of Scotland. — *Dundas v. Dundas*, 2 P. 618 (1783); *Rev. M.* 15585.

46. A disponee under a deed reserving the granter's liferent, but delivered, is entitled to reduce, on the head of vitiation, a subsequent disposition. — *Howie v. Merry*, 5 P. 101 (1806); *Aff. M. Writ*, Ap. No. 3.

47. A conveyance by a purchaser at a judicial sale, but uninfest, of the lands and decree of sale to his wife and her heirs, is not vacated in a question between her and his heirs, by his taking subsequently a crown charter to himself and his heirs and assignees, and such conveyance by the general name of the lands will include all that appeared to be intended to pass, although part of it was strictly known by a different name. — *M'Arthur v. Jamieson*, 1 W. & S. 59 (1825); *Aff. 2 S.* 23. See *Entail*, 21.

See FOREIGN, 11—TRUST, 10.

IV. SERVICE AND TITLES.

48. A retour as heir male and of provision does not make the heir liable to warrant his father's deeds as if heir male merely. — *Home v. Home*, Robert. 47 (1712); *Aff. M.* 5236, 12900.

49. Under a disposition to a person and his heirs of the body, whom failing, to ——— and his heirs and assignees, on failure of the first line, the heir of line of the disponent must serve as heir of provision to him. A service in special, "*tanquam legitimus et propinquior hæres*," includes service as heir of provision. — *Hamilton v. Boswell*, Robert. 192 (1717); *Aff.*

50. Service in special *cum beneficio*, as "*legitimus et propinquior hæres*" of his father in certain lands, contained in the marriage-contract with his mother, but the inventory including other lands, is not service merely as heir of provision, but as heir of line, and so prevents a challenge of any of the father's deeds by the heir. — *Ayton v. Colvill*, Robert. 221 (1718); *Aff. M.* 14009.

51. A party holding lands by a personal title under a destination, having for political purposes obtained a crown charter of the superiority to himself and his heirs whatsoever, held that a general service as heir male and of line to him carried the personal title under the charter, and therefore enabled the party served to alter the destination. But (after remit), held that a general service as heir male and of line does

not include service as heir of provision, even where the heir male is also the heir of provision. — *Blane v. Earl of Cassillis*, 5 P. 1 (1805), and 307 (1810); Rem. M. 14447; and M. Service of Heirs, Ap. No. 2.

52. A general service as heir male and heir of line is not equivalent to a service as heir of provision, even though all the facts are proved which would require to be proved had the claim been expressly as heir of provision. — *Cathcart v. Earl of Cassillis*, 1 W. & S. 239 (1825)*; Aff. M. 14447.

53. In a reduction of a retour finding that the claimant has failed to prove himself heir, another claimant, though not called as defender, is entitled to be sisted for his interest. — *Murray v. Bullerwell, Robert*. 436 (*ex p.*) (1723); Rev.

54. An estate being sequestrated, pending an action for establishing the legitimacy of the late proprietor's son, the sequestration was recalled, and the tutors of the son put in possession on the legitimacy of the son being established, although an appeal on the question was pending in the House of Lords. — *Macadam v. Walker*, 5 P. 673 (1813); Aff. See Appeal, 17.

55. Two parties having served to the same ancestor, one service was, on evidence, reduced, and an application for leave to give further evidence refused. — *Whyte v. Stewart*, 5 P. 60 (1806); Aff.

56. Where a party deceased has left an improbativ disposition of his estate to a charity, the trustees of which applied to the Crown for a gift of *ultimus hæres*, and a distant relative of the deceased served heir to him; remit to consider whether the charity trustees could reduce such service before their title under the deed was established, and whether, in order to support the service, it was necessary to prove a precise line and particular degree of propinquity, or whether evidence of repute that a family from which he traced descent was the same family as that of the deceased was sufficient. — *Richan v. Traill*, 5 P. 239 (1808); Rem.

57. Trustees infert, and a singular successor under a deed by the last heir, are entitled to appear and be heard for their interest in a competition of brieves. — *Ker v. Innes (Roxburgh)*, 5 P. 320 (1810); Aff. M. Tailzie, Ap. No. 13.

58. Reduction of service dismissed on the evidence. — *Alexander v. Mark*, 6 P. 444 (1819); Aff.

59. A service reduced on the ground of its being unsupported by the evidence. — *Hunter v. Hunter*, 1 S. Ap. 459 (1823); Aff.

60. Reduction of service on an allegation of bastardy dismissed, there being no direct proof of the marriage, but the weight of evidence of habit and repute being in favour of legitimacy. — *Lindsay v. Kerr*, 2 S. Ap. 147 (1824); Aff.

61. An heir of line is not entitled to pursue an action *ad exhibendum* of the titles after production of a tailzie excluding him until he reduces the tailzie. — *Cathcart v. Earl of Cassilis*, 1 W. & S. 239 (1825); Aff. M. 3993.

62. General service to a party infeft base carries an unexecuted procuratory, and infeftment thereon is infeftment only in the superiority, the *dominium utile* remaining in *hereditate jacente* until consolidated by resignation *ad remanentiam*. — *Ker's Trustees v. Kers*, 1 W. & S. 381 (1825); Aff. 2 S. 369.

63. Where one person has already expedé a general service, it is incompetent for another to expedé a second general service to the same ancestor, and such second service is reducible, and is not evidence of propinquity. — *Cochrane v. Ramsay*, 4 W. & S. 128 (1830); Rev. 6 S. 751.

64. An entail called as substitute a Major Hugh Galbraith, in the kingdom of Ireland, the entailer's cousin, and on failure of the prior substitutes the succession opened about a hundred years afterwards to his line; held that evidence that the claimant's ancestor was at that time settled in Ireland, a major, and known as a Scotsman, was, in the absence of evidence to the contrary, sufficient proof of identity. — *Galbraith v. Galbraith*, 5 W. & S. 84 (1831); Aff. 4 S. 734.

65. Two parties having served heir (through different lines) to the common predecessor, although the one first served had lodged a caveat against any other service, but had not received intimation of the second petition being presented, and both having brought reductions of the competitor's service; remit to the Court to direct one or more issues to try which had right, and to direct on which should be laid the burden of proof. Costs of both parties ordered to be paid out of the estate by the judicial factor on the estate. — *Watson v. Watson*, 7 W. & S. 535 (1835); Rev. 13 S. 543.

66. Question undecided, after remit to consider whether a party taking as *nominatim* disponent after failure of a prior *nominatim* disponent in the lifetime of the disponer, the deed having been undelivered, is conditional institute or substitute, and whether he ought to make up a title by service to the predeceasing disponent or in what other way, and, if he so served, whether he had a title enabling him to make a valid entail; but held that either by such service, or by the personal title vested in him as disponent, he could validly make an entail. Observed that at any rate a declarator is unnecessary. Observed by some of the Peers that such a point should be settled by the House, though it was not absolutely necessary for the decision of the case. — *Fogo v. Mather*, 2 Robin. 440 (1841); Rem. 2 D. 651. *Fogo v. Fogo*, 2 S. Bell, 195 (1843); Aff. 4 D. 1063.

67. After the verdict of a jury in a service the Court is entitled, on a reduction, to consider the evidence, but if it is conflicting a new trial ought to be ordered. — *M'Lean v. Officers of State*, 5 S. Bell, 60 (1846); Rem.

See ALIEN, 1—FEE AND LIFERENT, 9—LANDLORD AND TENANT, 33—
LEGITIMACY—PRESCRIPTION, 4, 5.

V. REPRESENTATION.

68. A disposition to a son who died minor and unmarried after taking infestment, but without recording the sasine, and no possession having followed, is reducible by creditors of the father's heir who had served to him and been infest in and possessed the estate after the son's death. — *Douglas v. Montgomerie*, Robert. 99 (1714); Aff. M. 13564.

69. A father having entailed his estate on his son and his heirs male, reserving his own liferent, and the son having bound himself and his heirs personally to pay his father's debts, and on the death of the father and son the estate, real and personal, being taken possession of by one of the father's creditors on a disposition *a non domino*. Held that this is not a vitious intromission relieving the son's heirs from liability, and that the creditor is entitled to payment of his debts, accounting only for his actual intromissions, and being liable to proceedings if he is proved to have abstracted or taken any particular paper out of the charter chest. — *Maxwell v. Houston*, Robert. 539 (1725); Rev. M. 9863.

70. An eldest son joining with the special disponee in granting discharges, does not become liable under the passive title of *gestio pro herede*. — *Clerk v. Gordon*, 3 P. 61 (1787); Rem. M. 9734.

71. Bonds over estates, part of which go to the heir male and part to the heir of line, are to be paid proportionably by each. — *Rose v. Rose*, 3 P. 66 (1787); Rev. M. 5229. See Entail, 152.

72. After service, the lodging of an inventory, within a year from the ancestor's death, under the Act 1695, c. 4, does not protect from universal representation, and the taking of assignments to the predecessor's debts, or payment of them by the successor, does not, without more, keep them alive as burdens on the estate. — *Codrington v. Johnstone*, 2 S. Ap. 118 (1824); Aff. F. C. 11 Feb. 1818.

73. When an heir-at-law, in order to take benefit by a will which does not affect the landed estate, but raises a case of election in regard to it, makes up his title to the estate for the purpose of collating it with the property passed by the will, he becomes liable on the passive title. — *Irvine v. Kirkpatrick*, 1 Robin. 475 (1841); Aff. 16 S. 1200.

See 48—BONA FIDE POSSESSION, 1—FORFEITURE, 17—MINOR, 5—
PRESCRIPTION, 1—TRUST, 6.

VI. APPARENT HEIR.

74. An heir passing by an ancestor who had been three years in possession uninfert, and had executed a gratuitous entail, and serving to a remoter ancestor last seized, is not bound to implement the tailzie. — Marquis of Clydesdale v. Earl of Dundonald, Robert. 565 (1726) ; Aff. M. 1274.

75. The Act 1695, c. 24, does not apply to gratuitous obligations incurred by an apparent heir, such as penalties in an agreement, but it does apply to onerous obligations, although the apparent heir at the time of incurring them possessed upon a feudal title, which was only reduced after his death, and without relief (in the special circumstances) against the executry. — Marquis of Annandale v. Earl of Hopetoun, Cr. & St. 225 (1739) ; Rev. Elchies v. Mutual Contract, No. 12.

76. Lands possessed in apparency for more than three years are liable to the debts of the heir so possessing, even although his heir does not make up a title to the lands at all. But lands of which the liferent was during the whole apparency in another are not liable. A minor heir-apparent may reduce adjudications led on his predecessor's debts, so far as concerns their personal effect, but not as regards the lands which he inherits. — Grant v. Sutherland, Cr. & St. 416 (1749) ; Rev. M. 5265.

77. The widow of one who had possession for more than three years on apparency is not entitled to sue the next heir for her jointure, he being unentered, and the estate being alleged to be in natural possession of the widow herself. — *N.B.* This is treated by More, *Notes on Stair*, cccxxv., and Bell, *Illus.* § 1929, as reversing the prior decision, No. 76, but there are specialties in this case unnoticed by these authors. — Grant v. Sutherland, Cr. & St. 605 (1755) ; Aff. M. 9819.

See BANKRUPTCY, 53—ENTAIL, 139—HUSBAND AND WIFE, 22.

VII. COLLATION.

78. An heir is not obliged to collate the heritable estate in Scotland on claiming right to a share in the personal estate of his father, domiciled in England. — *Balfour v. Scott*, 3 P. 300 ; 6 Br. P.C. 550 (1793) ; Rev. M. 2379 and 4617.

79. By ante-nuptial contract on a second marriage (there being two children of the first) the husband declared that the children of the intended marriage should succeed to an equal portion along with the children of the first, of his whole estate heritable and moveable. There were two children by the second marriage. Remit to consider whether the eldest son by the first marriage was entitled to the heritage, or was subject to collation, and whether the second child was entitled to a fourth, and was in that case bound to collate a special provision that

had been made for her. — *Bannerman v. Bannerman*, 4 P. 662 (1805); *Rem.*

80. An heir of entail, being also heir of line, must collate the entailed estate in claiming a share of the personal estate of the last owner, or legitim, and this whether he happens to be heir of line of the original entailer or not. — *Anstruther v. Anstruther*, 1 S. & M'L. 463 (1835); and 2 S. & M'L. 369; 4 Cl. & Fin. 33 (1836); *Aff.* 14 S. 272. *Marquis of Breadalbane v. Marquis of Chandos*, 2 S. & M'L. 377; 4 Cl. & Fin. 43 (1836); *Aff.* 14 S. 309.

See 72—FOREIGN, 8, 9, 10—PROVISIONS TO CHILDREN, 6.

HEIR AND EXECUTOR.

1. Where a deed of tailzie and a general settlement of moveables each contain a clause charging the disponee with payment of all the settler's debts, they are to be paid out of that estate respectively which would, without such clause, have been liable. — *Campbell v. Campbell*, Cr. & St. 436 (1749); *Aff.* M. 5213. *See* Entail, 152.

2. The executor, and not the heir, of one dying in apparenecy, is entitled to arrears of rent. — *Hamilton v. Hamilton*, 2 P. 137 (1767); *Rev.* M. 5253-4.

3. A direction in a will executed in England, that the executors shall pay all the testator's debts, does not apply to an heritable debt upon the real estate in Scotland disposed by the same deed. — *Frazer v. Spalding*, 5 P. 642 (1812); *Aff.* M. *Heir and Executor*, Ap. No. 3.

4. A sale of land, investment of the price in the Government funds in order to await the expiry of six months' notice to an heritable creditor of an intention to pay him off, and letters stating that the sum was to be so applied, bind the executor to apply it to the payment of the heritable debt. — *Earl of Minto v. Elliot*, 1 W. & S. 678 (1825); *Aff.* 2 S. 180.

5. The purchaser of an estate having agreed, as part of the price, to pay off an heritable debt upon it, and afterwards granted a personal bond of corroboration for the debt, his heir is bound to relieve the executor of the debt. — *Clayton v. Lowthian*, 2 W. & S. 40 (1826); *Aff.* 3 S. 271.

6. When the owner both of an entailed and an unentailed estate left his personal estate to his younger children, and also bound himself and the heirs succeeding in real estates, to pay a certain provision to younger children, it forms a burden on the heir of the heir first taking them, without relief against the executor of such heir. — *Lord Macdonald v. Macdonald*, 1 S. & M'L. 341 (1835); *Aff.* 10 S. 584.

7. The clause in the 4 and 5 Will. IV. c. 22, directing the apportionment of rents between the executor and heir, on the last owner

dying between the terms of payment, applies to Scotland, being expressed to apply to all payments in Great Britain and Ireland, although the language used is that of English law, and the preamble declares the intention to be to amend a statute which applied only to England.

— *Fordyce v. Bridges*, 6 *S. Bell*, 1; 1 *H. L. Ca.* 1 (1847); *Aff.* 6 *D.* 968.

8. The 4 and 5 Will. IV. c. 22, applies to heirs of entail in possession.

— *Baillie v. Lockhart*, 2 *M'Q.* 258 (1855); *Aff.*

See ENTAIL, 128, 134.

HERITABLE AND MOVEABLE.

I. BY CHARACTER, . . . p. 178 | II. BY CONVERSION, . . . p. 179

I. BY CHARACTER.

1. A bond to a husband and wife and the longest liver in liferent, and their daughter *nominatim* in fee, whom failing, to the husband, his heirs, executors, and assignees, is moveable; and the tutor for the daughter, in taking an heritable bond of corroboration for it, may properly take it to the daughter and the heirs of her body, whom failing, the executors of her father *nominatim*, so as to save them the necessity of confirming or serving. — *Stevenson v. Fife, Robert.* 216 (1718); *Aff.* *M.* 14852.

2. The phrase in a settlement, "All my goods, gear, debts, sums of money, corn, cattle, and other effects, which shall belong to me at the time of my decease, of what nature or kind soever they are," does not include heritable bonds or debts secured by adjudication. — *Ross v. Ross*, 2 *P.* 254 (1771); *Aff.* *M.* 5019. *See* Husband and Wife, 48.

3. The public funds of Great Britain are moveable estate in Scotland. Query as to French funds. — *Hog v. Lashley*, 3 *P.* 247 (1792); *Aff.* *M.* 8193.

4. Query, Whether an English bond, on which adjudication has been taken in Scotland, is moveable or heritable, so as to pass or not by an English will made by a domiciled Englishman. — *Martin v. Martin*, 3 *P.* 421 (1795).

5. An obligation to purchase an estate, and out of the price to pay the vendor's debts, moveable and heritable, as well as certain debts for which the purchaser was liable jointly with the vendor, forms a moveable debt in computing the widow's *jus relictæ*. — *Lowthian v. Ross*, 3 *P.* 621 (1797); *Aff.*

6. Money remitted by a Scotsman domiciled in India to his attorneys in England, to be laid out in security on land, and which was invested by them in heritable securities in Scotland, the titles being taken to them in trust for their client several years before his death in

India, does not pass by his will executed in India, but is heritable estate. — *Kyde v. Davidson*, 4 P. 63 (1798); *Aff. M.* 5597.

7. Observations by Lord Loughborough on the inconvenience of securities over real estate being considered heritable, and not passing by will. — *Crawford v. Coutts*, 4 P. 100 (1799); *Rem.* 14958.

8. An heir of entail in possession may assign by an English deed his life-interest in the interest of sums derived from the sale of part of the estate for the redemption of land-tax, the surplus of which had been invested in heritable bonds in Scotland, and the assignation is preferable to a subsequent general trust-deed for creditors. — *Scott v. Allnutt*, 5 W. & S. 416; 2 Dow & Clark, 404 (1831); *Aff.* 6 S. 62.

9. A steam-engine and machinery included in a lease of premises pass by judicial sale of the premises and pertinents. — *Cox v. Stead*, 7 W. & S. 497 (1834); *Aff.* 11 S. 672.

10. The engines and machinery of coal or other pits, of iron-works, of corn and thrashing mills, whether erected on property leased or in fee, and whether erected by a trading company or not, including all the smaller portions and tools used for the particular engine, are heritable, but duplicate parts and tools are moveable as regards legitim. Machinery taken by a tenant at a valuation, and to be left by him at a valuation, is moveable. — *Fisher v. Dixon*, 4 S. Bell, 286; 12 Cl. & Fin. 312 (1845); *Aff.* 5 D. 775.

11. Opinion by majority of Lords that a sum invested in an assignation of an heritable bond taken to trustees is heritable as to the succession of the truster. — *Johnston v. Johnston*, 3 M'Q. 619 (1860); *Aff.* 19 D. 706.

12. The right to a share of heritable estate vested in trustees is heritable, and must be taken up by service, in order to take it out of the *hereditas jacens* of the last holder. — *Buchanan v. Angus*, 4 M'Q. 374 (1862); *Aff.* 22 D. 979.

See ERROR OF LAW, 8—PROVISION TO CHILDREN, 15—RANKING AND SALE, 2—REAL BURDEN.

II. BY CONVERSION.

13. In a trust settlement of real and personal estate a power to sell, if not given expressly, or by necessary implication, is not to be presumed, and directions to pay debts and to invest the proceeds of the real and personal estate in land to be entailed, does not amount to a power to sell unentailed estates for that purpose, and these therefore pass to the heir-at-law. — *Allan v. Glasgow's Trustees*, 2 S. & M'L. 333 (1835); *Rev.* 10 S. 438.

14. A conveyance of lands to trustees, with power to sell after the truster's death, and to pay debts and provisions, and then to denude

themselves by assigning, making over, or paying the residue as directed, and in default of direction, in certain proportions to parties named, which in a subsequent deed is recited as a requisition on the trustees to turn the estate into money, is to be taken as a direction to sell, and therefore makes the estate personal in the trustees' hands. — *Williamson v. Advocate-General*, 2 *S. Bell*, 89; 10 *Cl. & Fin.* 1 (1843); *Aff.*

15. A domiciled Englishman having, through an attorney in Scotland, sold an estate there, one-third of the price to be paid at the next term, and two-thirds two years thereafter, during which time they should "remain a burden over the property till paid," and interest paid on them, and the vendor having died after the date of payment of the one-third, but before that of the two-thirds, and having left a will in the English form bequeathing all his property; held that the two-thirds was heritable, and did not pass by the will. — *Mead v. Anderson*, 4 *W. & S.* 328; 2 *Dow & Clark*, 60 (1830); *Aff.* 6 *S.* 1034.

16. Under a trust to hold lands for nineteen years, and then to sell and divide the price, the rents being meantime paid to the beneficiaries, an agreement being entered into by the beneficiaries that they should be sold before that period if necessary, the share of one dying before sale is moveable as to the capital, but the rent till sold goes to the heir-at-law. — *Ferrie v. Ferrie*, 2 *Stu. H. L.* 7 (1852); *Aff.*

17. A trust of heritable and moveable estate to pay debts and legacies, and then "to pay the whole residue, heritable and moveable, to the residuary legatee," with power, but not direction, to sell the heritage, does not operate a conversion of the heritable into moveable estate. — *Advocate-General v. Smith*, 1 *M'Q.* 760 (1854); *Aff.* 14 *D.* 585.

18. A direction to trustees to "pay over, in equal shares, the residue of his estate," which was both heritable and moveable, with power to them, if necessary, to convert the same into money, is not a trust for conversion, and being dependent on the discretion of the trustees, and not indispensable to the execution of the trust, it does not operate as a conversion. — *Buchanan v. Angus*, 4 *M'Q.* 374 (1862); *Rev.* 22 *D.* 979.

HOUSE OF LORDS.

I. AUTHORITY OF JUDGMENTS, p. 180	III. SPEECHES BY PEERS, . . . p. 183
II. SITTING AND VOTING OF PEERS, 182	IV. ENGLISH JUDGES CONSULTED IN SCOTTISH APPEALS, . . 183

I. AUTHORITY OF JUDGMENTS.

1. The House of Lords is not bound by its decisions if it considers them on reconsideration to be bad law. (Per Lord Thurlow)—"There

is no rule of law founded on a proposition so absurd, as that even in the last resort there is absolute infallibility." — *Forbes v. Macpherson*, 3 P. 169 (1790).

2. The decisions of the House are not binding upon it if palpably erroneous. (Per Lord Stanhope.) — *Lord Daer v. Stewart*, 3 P. 298 (1793).

3. In affirming on argument a judgment of the Court of Session, opinion expressed by Lord Loughborough, that, on a new case occurring, that Court should reconsider their decision. — *Smith v. Newlands*, 4 P. 43 (1798).

4. Per Lord Eldon: "I own that the judgments given in the cases of Duntreath, and some other cases relative to entails, appear to me to shock every principle of common sense. In this country, also, a mode was devised by the Judges, of getting rid of entails by fictitious recoveries, &c. It would have been more principled and wholesome, if the Judges in both countries had applied to the legislature when they deemed the law required amendment, than thus to have repealed it by judgments in Courts. It is too late now to enter into those cases; the security of much landed property must necessarily lead your Lordships to act on the principles recognised by the Courts, and repeatedly adjudged in your Lordships' House." . . . "Therefore when I move your Lordships to affirm the interlocutor complained of, I shall give my vote as *not content*, protesting that as a Judge I never could have concurred in the former decisions originally when they were pronounced." — *Bruce v. Bruce*, 4 P. 231 (1801); *Aff. M.* 15539. *Menzies v. Beresford*, 4 P. 247 (1801).

5. The House of Lords will not rehear an appeal on the merits, but it will correct any error of form it has fallen into, and will, either if there has been any fraud upon it, or if there has been any natural misunderstanding in the parties through which any point has not been properly discussed, allow it to be heard again, or remit it to the Court below as may be just. — *Stewart v. Agnew*, 1 S. Ap. 413 (1823); *Rev.* 2 S. 64. See Appeal, 123—Bankruptcy, 37—Sheriff, 9.

6. Observed by Sir John Leach, M.R., that the House may decide cases on grounds not touched upon or suggested in the Court below, and a decision of the House cannot be impugned in argument, directly or indirectly. — *Auld v. Mags. of Ayr*, 2 W. & S. 607 (1827). See 24.

7. The House may come to a different decision, either as regards inference of fact or law, from that which it came to in a prior case of the same circumstances, and may correct any error or mistake; but it will, like other courts, endeavour to preserve uniformity of decision. (Per Lord Brougham.) — *Dickson v. Cunningham*, 5 W. & S. 690 (1831).

8. Explanation, that the House in the Hoddam case inserted in the

judgment the conclusions of the libel *per incuriam*, embracing in them a point which had not been argued, and on which no decision was intended to be given, namely, that the party might alienate for gratuitous causes, and observed, that though that decision might operate as *res judicata*, it could not be taken as an authority for the doctrine. (Per Lord Brougham.)—*Carrick v. Buchanan*, 1 *S. Bell*, 380 ; 3 *S. Bell*, 342 (1844). See *Entail*, 88.

9. Per Lords Brougham and Campbell : Nothing but an Act of Parliament can alter the law laid down by a decision of the House.—*Colville v. Colville*, 4 *S. Bell*, 248 (1845).

10. Opinion of Lord St Leonards that the House may correct error of law laid down in its own judgments on future cases occurring.—*Scott v. Maxwell*, 1 *M'Q.* 791 (1854) ; 12 *D.* 932.

11. When the House has made an order that all the parties should be examined in the Jury Court, and found afterwards that two of the parties were dead, the House, after a search of precedents, ordered its instructions to be struck out.—*M'Gavin v. Stewart*, 4 *W. & S.* 195 (note) (1830). See 9 *S.* 17, and 5 *W. & S.* 807.

12. The judgments of the House cannot be interpreted by the opinions delivered by the Peers in moving the judgment, but in any matter not decided by the judgment, great weight is due to their opinions. (Per Lord Brougham.)—*Maule v. Maule*, 6 *W. & S.* 661 (1832).

13. Question, Whether, when the Peers in giving judgment, notice without dissenting from the *ratio decidendi* in the Court below, but do not rest their own judgment expressly on it, it is to be taken as affirmed?—*Maxwell v. Maxwell*, 5 *S. Bell*, 165 (1846) ; 6 *D.* 255.

14. A judgment of the House of Lords, if obtained by fraud or collusion, is a nullity. Question, Whether it can be set aside by a suit originating in an inferior Court, or only by an application to the House?—*Shedden v. Patrick*, 1 *M'Q.* 535 (1853).

See case considered as overruled, *HEIR*, 76, 77, *sed qu.* Also cases declared not to form precedents or preclude reconsideration, *ARBITRATION*, 3, 14—*BANKRUPTCY*, 22—*CHARITY*, 6—*LEGITIMATION*, 1.

II. SITTING AND VOTING OF PEERS.

15. Lord Eldon, having been counsel in some previous appeals, stated that it was only as a matter of necessity, from the absence of other Peers, that he sat to hear a subsequent appeal relative to the same matter.—*Lashley v. Hog*, 4 *P.* 603 (1804).

16. Lord Brougham, C., stated, that having been consulted as counsel for the appellants, he would rather not hear the case ; but at the request of the respondents, and of consent of parties, he heard it.—*Soc. of Solicitors v. Smillie*, 4 *W. & S.* 375 (1830).

17. A Peer will not take part in hearing an appeal in which a Company of which he is a shareholder is a party. Question, Whether this rule could be altered otherwise than by statute? — *London and N. W. Ry. Co. v. Lindsay*, 3 M'Q. 114 (1858). See Court of Session, 12.

III. SPEECHES BY PEERS.

18. Reasons given on affirming. By Lord Thurlow—*Mercer v. Ogilvie*, 3 P. 434 (1796). By Lord Loughborough—*Duggan v. Wight*, 3 P. 610 (1797); *Sime v. Viscount Arbuthnot*, 3 P. 613 (1797). By Lord Eldon—*Donaldson v. Lord Perth*, 4 P. 112 (1800). By Lord Thurlow—*Forster v. Paterson*, 4 P. 295 (1802). By Lord Rosslyn—*Soc. of W.S. v. Soc. of S.S.C.* 4 P. 326 (1802).

19. Observed by Lord Eldon that he had often lamented the usage of the House, which prevented the grounds of judgment being stated on affirmance. — *Graham v. Henderson*, 4 P. 421 (1802).

20. Speeches in affirming, by Lords Eldon and Rosslyn. — *Davidson v. Fleming*, 4 P. 554 (1804).

21. Reasons for affirmance, given by Lord Eldon, where he did not approve of all the cases treated as precedents. — *Earl of Kinnoul v. Dalgleish*, 4 P. 671 (1805).

22. Speech and motion by Lord Lauderdale, opposed by Lord Eldon, who moved to affirm with a variation. — *Earl of Wemyss v. Macqueen*, 5 P. 210 (1808).

23. Reason stated on affirmance by Lord Eldon. — *Earl of Wemyss v. Carre*, 5 P. 219 (1808); *Arnot v. Stewart*, 6 P. 289 (1817); *Geddes v. Pennington*, 6 P. 312 (1817).

24. On the death of Lord Gifford, and resignation of the Great Seal by Lord Eldon (1827), Alexander, C.B., and Leach, M.R., were appointed to hear appeals from Scotland, but had not the power of delivering their opinions in the House. See 2 W. & S. 558.

25. Question whether the opinion of a Peer, who was present at the argument, but absent when judgment is given, can be read to the House. Opinion of Lord Westbury that it can. Observed by Lord Chelmsford, that it is only done when the opinion agrees with the judgment to be pronounced. — *Yelverton v. Yelverton*, 4 M'Q. 834 (1864).

IV. ENGLISH JUDGES CONSULTED.

26. The opinion of the English Judges taken only on a question framed as if it occurred in England. — *Gordon v. Lord Advocate*, Cr. & St. 558 (1754).

27. Observations on the disadvantage of not having the assistance of the Scottish Judges in the same manner as that of the English Judges. (Per Lord Brougham.) — *Cogan v. Lyon*, 4 W. & S. 397 (1830).

28. The order for attendance of the English Judges at the hearing of an appeal discharged on the objection of one of the parties. Lords Campbell and Brougham approved of the English Judges being called in. — *Edin. and Glasgow Ry. Co. v. Mags. of Linlithgow*, 3 M'Q. 691 (1859).

Note.—English Judges were consulted in Appeal, 100—Alien, 1—Bankruptcy, 30—Belligerent, 4—Excise, 2—Forfeiture, 14, 16—Insurance (Marine), 3—Statute, 17, 24—Succession Duties, 1—and see 24.

See LAW OF SCOTLAND, 1.

HUSBAND AND WIFE.

I. MARRIAGE, CONSTITUTION OF,	p. 184	IV. WIFE'S RIGHT OF ALI- MENT,	p. 188
II. RESTRAINTS ON MARRIAGE,	187	V. MARRIAGE-CONTRACTS, .	189
III. WIFE'S CAPACITY AND LIA- BILITY,	188	VI. PROPERTY OF SPOUSES, .	192
		VII. COURTESY AND TERCE, .	194
		VIII. DIVORCE,	195

I. CONSTITUTION OF MARRIAGE.

1. A marriage alleged to have been legally solemnised, and also constituted by habit and repute, held not established by evidence on either head. — *Dalrymple v. Dalrymple*, 6 P. 671 (1741); *Aff.*

2. Appeal withdrawn before answer. — *Countess of Strathmore v. Forbes*, 6 P. 684 (1751).

3. A clandestine marriage, followed by public cohabitation as married parties for twenty years, is not set aside by strong (but not irresistible) evidence of a prior private marriage, concealed till after the husband's death, the alleged first wife having been aware of, and having publicly acquiesced in the conjugal cohabitation; but there is no personal bar against the alleged first wife attempting to set up her marriage. — *Kennedy v. Campbell*, Cr. & St. 519 (1753); *Alt. M.* 10456.

4. Letters from the husband introducing the lady as his wife, with others urging her to "come home," &c., found sufficient to prove marriage, the libel being alternately for marriage, or for damages for seduction. — *Macalister v. Dun*, 2 P. 29 (1759); *Aff.*

5. Cohabitation for six months in the Isle of Man as husband and wife, and having a child born there baptised as legitimate, is not sufficient to establish marriage. (Per Lord Hardwicke)—"The cohabitation required by law to establish a marriage ought to be *inter familiares natos et vicinos*, where one of the parties has a domicile." — *Macculloch v. Macculloch*, 2 P. 33 (1759); *Aff. M.* 4591.

6. The pursuer of a declarator of marriage having founded upon a written acknowledgment, which, on consideration of the defender's judicial declaration, was held insufficient to establish marriage, is not

entitled to demand to be allowed either to support it by other evidence, or to set up in the same action a different mode of constitution of marriage. — *M'Innes v. More*, 3 P. 40 (Incorrect Report. See App. Cases) (1785); Aff. See 7.

7. Where the only evidence is a written acknowledgment given by the man, some months subsequent to its apparent date, and his judicial declaration, in which he stated it was not given, or accepted, or understood by either party as constituting marriage, but merely as a colour to serve a different purpose, which had been concerted between them, which is corroborated by other circumstances, it is not sufficient proof of marriage. — *More v. M'Innes*, 2 P. 598 (1782); Rev. M. 12683.

8. Letters addressed by a man to a woman as his wife, with cohabitation and evidence of partial repute, held to constitute marriage, although the woman had solemnly denied cohabitation. — *Robertson v. Inglis*, 3 P. 53 (1787); Aff. M. 12689.

9. Letters of acknowledgment of marriage interchanged, being held on evidence not to have been intended or understood, by either party, to constitute a final agreement or marriage, but to have been expressly agreed to be given up if the purpose for which they were given should prove unattainable, marriage is not constituted. — *Kello v. Taylor*, 3 P. 56 (1787); Rev. M. 12687.

10. Evidence of cohabitation, with limited repute as husband and wife, and evidence of acknowledgment, held insufficient to establish the marriage in a reduction of a service on the question of legitimacy, the woman being of bad character. — *Heriot v. Makgill*, 4 P. 77 (1799); Aff. See Heirs, 60.

11. Marriage is constituted by declaration made solemnly, seriously, deliberately, and publicly, in the presence of witnesses, and it is not affected by the death of the husband a few hours after, whether by accident or suicide, there being evidence that at the time of the declaration he was of competent mind and understanding. — *M'Adam v. Walker*, 5 P. 673; 1 Dow, 148 (1813); Aff. M. Proof, Ap. Nos. 3, 4.

12. When a connection has at its commencement been illicit, there is a presumption against its being subsequently converted into marriage. Evidence of celebration and of habit and repute held insufficient. Observed that repute, if divided, does not raise a presumption of marriage. — *Cunningham v. Cunningham*, 4 Dow, 483 (1814); Rev. F. C., 8th March 1810, note.

13. Cohabitation commenced when one of the parties is married, does not become legal marriage by mere continuance after the impediment of prior marriage is removed. To give it that effect there must be some distinct act indicating intention to change its character. Question, What would be the law if, at the commencement, both parties had *bonâ fide*

believed that there was no impediment. — *Lapsley v. Grierson*, 1 H. of L. Ca. 498 (1848); Aff.

14. Mutual written agreements, undated and unaddressed, "to be a true," &c., husband and wife respectively, on condition that the other party was the same, and containing also a promise to keep the document secret, followed by copula, constitutes marriage. — *Reid v. Laing*, 1 S. Ap. 440 (1823); Aff.

15. A clandestine marriage, hurriedly and suddenly performed, may be set aside on proof from their conduct before and afterwards, that the parties had no real matrimonial intention, and never regarded the ceremony as binding. Question, Whether, if the result had been otherwise, the action of declarator of marriage and adherence could have proceeded without making parties a man to whom the woman was subsequently married, in the life of the first husband, and her children by such second marriage. — *Jolly v. McGregor*, 3 W. & S. 85; 1 Dow and Clark, 208; 2 Bligh, N.S. 393 (1828); Rev. Ferg. Rep. 51. *Campbell v. Cochrane*, 3 W. & S. 135, note, and list of cases on parties at p. 202.

16. In a summons of declarator of marriage, it was alleged that from a certain letter, and other letters and documents, and facts and circumstances, it would be proved that the persons were married persons. Held that though the summons was badly drawn, it would support a marriage by promise *subsequente copula*. (Per Lord Brougham)—The promise may be established by proof of facts and circumstances without writing, and the cohabitation must be in direct connection with the promise. Courtship is not a promise, but it is probable evidence of a promise; and when the probability of a promise is great, it may be turned into certainty by the fact of cohabitation following. — *Honyman v. Campbell*, 5 W. & S. 92; 2 Dow & Clark, 265 (1831); Aff. 8 S. 1039.

17. Letters and acts leading to the inference that a contract of marriage, believed to be binding by at least one of the parties, had been entered into, held to prove the marriage, whether they were written and done by the other party with a view of evading the consequences of marriage or not. After copula following on a written promise of marriage, it is immaterial whether the letters are given up or not, as the marriage is irrevocable. (Per Lord Brougham)—Even if the promise was surrendered before copula, it might be held to be revived by the copula. — *Hoggan v. Craigie*, M'L. & R. 942 (1839); Aff. 16 S. 584.

18. A letter declaring a woman to be the writer's wife, in the event of a child being born, does not constitute marriage, and although delivered after the birth of a child, it does not constitute marriage, if the circumstances prove it was delivered for another purpose. — *Stewart v. Menzies*, 2 Robin. 547; 8 Cl. & Fin. 309 (1841); Aff. 14 S. 427.

19. A letter by a man to a woman with whom he cohabits, declar-

ing her to be his wife, constitutes marriage if shown or read to her, and believed by her to be *bond fide*, although the purpose of the man in writing it has been to deceive her or others, and though it was not delivered to her. Evidence of communication of such a letter, which was held sufficient. Evidence of habit and repute, being conflicting, held insufficient. — *Hamilton v. Hamilton*, 1 S. Bell, 736 ; 9 Cl. & Fin. 327 (1842) ; Aff. 2 D. 89.

20. Evidence of declarations of marriage, or of promise of marriage, *subsequente copula*, held insufficient, the promise not being in writing, nor followed without interval by copula in Scotland, and it not being certain that the cohabitation could be referred to it. An invalid ceremony of marriage in Ireland will not, when followed by cohabitation in Scotland, constitute marriage. A reference to oath of the defender, before judgment of the House, refused. — *Yelverton v. Yelverton*, 4 M'Q. 743.

21. Marriage with a deceased wife's sister being assumed to be illegal and capitally punishable in Scotland, the law of Scotland would not recognise it though taking place in another country where it is valid. Such marriages prior to the 5 and 6 Will. IV. c. 54, were void in England, though only challengeable during the life of the parties ; and therefore a foreign Court will not, through courtesy, treat them as valid in England from the fact that they had not been challenged. The heir succeeding to real estate in any country must be the heir who is legitimate by the law of that country. — *Fenton v. Livingston*, 3 M'Q. 497 (1859) ; *Rev.* 18 D. 865.

II. RESTRAINTS ON MARRIAGE.

22. A bond by one who has possessed three years an apparency in favour of his granddaughter, and declared to be irrevocable, except in the event of her marrying without his consent, if in life, or without consent of certain named persons after his death, is exigible though the lady marries after her grandfather's death without the specified consents. — *M'Lean v. M'Lean*, 2 P. 95 (1765) ; *Aff.*

23. Opinion that a codicil revoking a legacy to a daughter, in the event of her marrying or having married a named person, is valid in Scotland as well as England. — *Ommaney v. Bingham*, 3 P. 448 (1796) ; *Rev.*

24. Legacies to daughters being directed to be paid on marriage, if with the approbation of the trustees of the will, but if without consent, then to be held in trust for their children, and if they should not marry, then to fall into the residue ; held that, on the death of the trustees, the consent of their representatives was not necessary to a marriage, and that if the residuary legatee acquiesced, the legacies might be paid at once to any daughter, whether married or not, and

payment could not be claimed again by their husbands, in the event of a subsequent marriage. — *Grant v. Dyer*, 2 *Dow*, 73 (1813); *Rev.*

25. A father having left his estate to trustees for his natural son, provided he did not marry a certain lady, and if he did, then for his own brother, who was in India, and the son having married the lady, and then, by agreement with his uncle's attorneys (who acted without authority), compromised the question by accepting half the value of the estate, expressly leaving the valuation of one part of it to his uncle, and declaring that he had no legal claim to it, he cannot compel his uncle to put a value on such portion. — *Graham v. Graham*, 1 *S. Ap.* 365 (1823); *Rev.*

III. WIFE'S CAPACITY AND LIABILITIES.

26. The office of tutor nominate of her child comes to an end on the second marriage of the mother. — *Cuthbert v. Mackenzie*, 2 *P.* 377 (1775); *Aff. But see Trust*, 16.

27. In an action for damages for slander directed against a wife and her husband for her interest, and to which he lodged defences for himself and as curator for his wife, repeating the slander, and offering to prove it, but in which proof he failed, and the wife was found guilty of the scandal libelled, and liable in a fine to the Fiscal, damages to the pursuer, and expenses—held, 1st, That execution could not pass against the wife's person during the marriage for either the fine, damages, or expenses; 2d, That neither the husband's person nor estate was liable for the fine or damages; 3d, That he was not liable generally for the expenses, but was liable for so much of the expenses as was caused by the conduct of the defence, in so far as it was malicious, vexatious, and calumnious. — *Baillie v. Chalmers*, 3 *P.* 213 (1791); *Alt. M.* 6083.

28. A married woman may without concurrence of her husband sue for damages for slander against herself, a *curator ad litem* being appointed to concur with her. — *Ewing v. Cullen*, 6 *W. & S.* 566 (1833); *Aff.* 9 *S.* 31.

29. A married woman cannot bind herself by signing a bill, even as joint acceptor with her husband. — *Earl of Strathmore v. Ewing*, 6 *W. & S.* 56 (1832); *Rev.* 4 *S.* 310.

30. A wife's domicile follows her husband's. Question, How far this continues the rule after a judicial separation. A marriage is held to be in the country of the husband's domicile. — *Geils v. Geils*, 1 *M'Q.* 255; 2 *Stu. H. L.* 13 (1852); *Aff.* 13 *D.* 321. . See 60, 83.

IV. WIFE'S RIGHT OF ALIMENT.

31. A wife is not barred from suing for suitable aliment, by a contract of separation in which she had agreed to accept a small sum, while they should agree to live separate. L.300 per annum out of the

husband's estate of L.1100 per annum granted. — *Earl of Caithness v. Countess of Caithness*, Cr. & St. 654 (1757); Aff.

32. It is not adherence on the part of a husband if he does not receive his wife in his house, but only takes separate lodgings for her, and does not there cohabit or lodge with her, and in these circumstances she is entitled to claim a separate aliment. — *Arthur v. Gourlay*, 2 P. 184 (1769); Aff.

33. Interim aliment cannot be awarded until a *prima facie* case of marriage has been established, and on failure to prove a marriage, it is incompetent to award permanent aliment to the pursuer on the ground that by a written document she had been represented by the defender at one time to be his wife, it not having been an engine of seduction. — *Campbell v. Sassen*, 2 W. & S. 309 (1826); Rev. 2 S. 193, and 3 S. 159.

V. MARRIAGE-CONTRACTS.

34. Inhibition by the parties named in a contract of marriage as those at whose instance execution should proceed, upon an obligation in the contract to settle the estate upon the husband and the heirs of the marriage, prevents a subsequent gratuitous alienation by the husband. — *Home v. Home*, Robert. 47 (1712); Aff. M. 5236, 12900. See Fee and Liferent, 10—Heir, 20.

35. A husband being bound by marriage-contract to leave his household furniture and heirship moveables at his death to his widow, and having thereafter granted bond to her for L.7000, payable at the first term after his death, and still later provided her in the liferent of a house after his death, the provision in the contract is not extinguished, but the three rights subsist independently. — *Cockburn v. Hamilton*, Robert. 61 (1713); Rev. M. 5911.

36. An agreement in the contract of marriage that the estate of the wife should be conveyed to her father, in consideration of a marriage portion given by him, though reduced as to the wife on the head of minority and enorm lesion, yet binds the husband as regards his courtesy, he having been major, but does not bind him in the penalty under which he had bound himself that his wife should ratify the deed when of age. — *Hamilton v. Boswell*, Robert. Ap. 346 (1721); Aff. 5 Br. Sup. 21. See Minor, 3.

37. A bond of annuity being granted to a married woman by her husband, on consideration of her renouncing her settlement provisions, and settling her separate estate on her eldest son, but the deed of renunciation and settlement being never delivered, and afterwards found cancelled in her hands, she is presumed to have cancelled it herself, and is not entitled to claim the annuity, nor to prove the tenor of the

deed so as to set it up again, and so entitle herself to the annuity. — *Houston v. Schaw, Robert.* 561 (1726); *Aff.*

38. A., the uncle and late guardian of B., having obtained from him a conveyance to all his estate, with warrandice, a month before B.'s marriage, to the treaty for which A. was at the time privy, the conveyance merely reserving B.'s liferent, with power to his heir male to redeem on payment of A.'s advances, and in case of no heirs male, power to grant reasonable provisions to daughters, but no mention of provisions to the wife of B., on which conveyance sasine was taken before the marriage, but not registered till after it; held that the marriage-contract of B., in which half his estate was provided to his wife in liferent, and on which sasine was taken and registered before registration of the sasine on the conveyance to A., effectually excluded A.'s claim to that extent, and that B. having during marriage assigned to his wife some personal bonds, she was not after his death liable, under the warrandice on the conveyance to A., to make good to him out of these bonds the value of the liferent provision settled upon her. — *Napier v. Napier*, Cr. & St. 1 (not fully reported). See *Lords' Journals*, 29th April 1726, and Appeal Case.

39. A lady infeft in jointure lands is not debarred by a personal agreement with her son from having recourse to the lands even in the hands of an onerous purchaser, her infeftment never having been renounced, and she is not excluded by a prior wadset of the lands, the right to which had been acquired by the purchaser, but the amount of which he had retained out of the price of the lands. — *Gordon v. Urquhart*, Cr. & St. 176 (1736); *Aff.*

40. A provision to children of certain sums, and in case of no children surviving the husband, or of their dying before minority or marriage, then in fee to the wife, gives her a *jus crediti* which she may assign before the condition of the death of children is purified. But provisions made in a subsequent deed in favour of the wife, to take effect in the event of the death of the children before minority or marriage, are not assignable by her before the condition is purified. — *Burden v. Smith*, 1 Cr. & St. 215 (1738); *Elchies v. Mutual Contract*, No. 7.

41. A father having in his eldest son's contract of marriage conveyed his estates to the son, reserving to himself a liferent annuity, and a provision for his own younger children, and the estate turning out deficient, the provisions in the marriage-contract in favour of the son's widow and children take effect preferably to the reserved burdens, and there is no room for the claim of *beneficium competentiae* to the father. — *Hog v. Hog*, Cr. & St. 469 (1750); *Rev. M.* 4862.

42. A contract of marriage giving, in default of heirs, the wife's estate to the husband in fee, sustained on the ground that the marriage

had actually followed, and that the wife's father was proved of sound mind, although his bodily health was extremely weak, the marriage sudden and against the wife's inclination, and she herself only eleven years of age at the time. — *Irvine v. Irvine*, Cr. & St. 547 (1753) ; *Rev. Elchies v. Fraud*, No. 32.

43. An onerous and rational provision made by the owner infeft in an estate in favour of his wife, does not fall by a reduction of his title in virtue of a latent personal obligation. — *Stewart v. Heron*, Cr. & St. 432 (1749) ; *Aff. M.* 1705.

44. A widow who under her marriage-contract had been infeft in liferent in lands, but had afterwards concurred with her husband in granting an heritable security upon them, upon which the creditor adjudged and possessed for twenty-five years, but without declarator of expiry, is entitled, on paying off the creditor's debt, to an assignation of the debts and adjudication, to the effect of obtaining relief against the heir. — *Govan v. Simpson*, 2 P. 27 (1759) ; *Aff.*

45. A widow having been led to restrict her claims under her marriage settlement by the belief that her husband's estate was nearly exhausted by debts, and on the consideration that certain bonds of provision to the children, which she believed reducible *ex capite lecti*, should be implemented, and a valid liferent granted to herself, is entitled, on discovering that there would be a considerable surplus, and that the deeds were not reducible, to reduce her bond of restriction, and recur to her marriage-contract rights. — *Lady Forbes v. Lord Forbes*, 2 P. 36 and 84 (1760–65) ; *Rev. See Error of Law*, 8.

46. A wife is not bound by a renunciation executed by her of the provisions of her marriage-contract proceeding upon an erroneous belief of her rights. — *Lady Cranstoun v. Scott*, 2 P. 425 (1777) ; *Rev. M.* 6108, and *Ap. 1, Husb. and Wife*, No. 1.

47. The wife's estate being in the marriage-contract conveyed to the husband, and by him reconveyed to her after marriage, but afterwards sold, and bonds for the price taken in his name alone, this is a revocation of the gift to her. — *Earl of Fife v. Mackenzie*, 3 P. 549 (1797) ; *Aff.*

48. An assignation by the husband to the wife in a marriage-contract of all moveable goods, gear, and effects which should belong to him at his death, does not convey money or debts ; and a like assignation by the wife to the husband, his heirs and assignees, does not, on the wife surviving, prevent her from leaving them by will to another party. — *Earl of Fife v. Mackenzie*, 3 P. 549 (1797) ; *Aff. M.* 2325. *See Heritable and Moveable*, 2.

49. A post-nuptial contract of marriage by which each party assigned his or her rights to the survivor, providing, in the case of the wife surviving, that it should be in full of all her legal claims, and that she

should be bound to educate and provide for the children, is not gratuitous or revocable by the husband, even after his means come to be greatly more than at the time of the contract. — *Hepburn v. Brown*, 2 *Dow*, 342 (1814); *Rev.*

50. Terms of a marriage-contract referring to a professional annuity due to the widow, under which she was held entitled to have the amount made up by the husband's executors, on its ceasing by her second marriage, or being diminished by other causes. Letters prior to the contract and the husband's will are not admissible as evidence by which to construe the contract, but may be looked at to ascertain the circumstances existing at the time of the marriage. — *Forlong v. Taylor's Exrs.*, 3 *S. & M'L.* 177; 5 *Cl. & Fin.* 380 (1838); *Aff.* 15 *S.* 126.

51. An obligation in a post-nuptial contract to pay a certain sum to the wife, or to any person she shall appoint by writing, and whether she survived her husband or not, the sum to be payable at the first term after her husband's death, vests the sum in her on survivance, although she does not exercise her power of appointment, nor calls in nor bequeaths the fund by will. — *Dill v. Earl of Haddington*, 2 *Robin.* 298; 8 *Cl. & Fin.* 168 (1841); *Rev.* 2 *D.* 214.

52. When a father and son bind themselves jointly and severally to pay the son's intended wife, an annuity during her widowhood, the father's personal estate is directly liable, and not merely as cautioner for the son; and therefore it is not liberated by the son making a farther allowance to his wife, to take effect on widowhood, out of the rents of his entailed estate after the father's death. — *Cruickshank v. Cruickshank*, 4 *S. Bell*, 179 (1845); *Aff.* 5 *D.* 733.

53. Powers reserved in a marriage-contract to be exercised on the dissolution of a marriage by death, may be equally exercised on dissolution by divorce. — *Cunninghame v. M'Leod*, 5 *S. Bell*, 210 (1846); *Aff.* 3 *D.* 1288.

54. A trust-disposition of a woman's lands, made in contemplation of her marriage, to the issue of the marriage, whom failing, her heirs-at-law, is onerous only as regards the issue, and though not containing an express power of revocation, may be revoked on her being divorced without issue. — *Cunninghame v. M'Leod*, 5 *S. Bell*, 210 (1846); *Aff.* 3 *D.* 1288.

See CAUTIONER, 10—FEE AND LIFERENT—FORFEITURE, 1—HEIRS, 40
—MINOR, 3—PROVING THE TENOR, 6.

VI. PROPERTY OF SPOUSES.

55. The husbands of two heirs-portioners having entered into a submission as taking burden on them for their wives (but without the wives signing the submission), respecting an apprising over the estate,

and the decree having ordained the apprising to be conveyed to the husbands and their wives, the husbands to pay the price, and it being actually paid by a real burden granted by the wives over the estate, with consent of the husbands, the fee of the apprising is in the wives.

— *Murray v. Murray*, Robert. 144 (1715); *Aff.*

56. A wife having assigned a bond to her husband, who by his will conveyed it to her as trustee for his grandchildren, and she having signed the will, and recognised the trust after the death of her husband, she cannot revoke the assignation as a *donatio inter virum et uxorem*. And the husband having in the will appointed a person as “overseer” of the trust, to whom the widow afterwards assigned the bond on the narrative of an onerous cause, and granted to him a general discharge of intromissions, such narrative and discharge does not relieve him of the necessity of proving the onerous cause on challenge of the assignation by one of the grandchildren, even after the lapse of fifty years. — *Gregory v. Grazier*, Robert. 178 (1716); *Aff.*

57. A bond blank in the creditor’s name, being delivered to the wife of one who had conveyed his whole estate by a *mortis causa* deed to the grantor of the bond, and after the husband’s death a new bond having been granted by the same party to the widow by name, on her giving up the original, and binding herself to relieve the grantor of all claims by the executor of her late husband, the said executor was found to have sole right to the bond. — *Morison v. Scott*, Robert. 269 (1720); *Aff. M.* 5011.

58. A wife cannot, without her husband’s consent, restrict an annuity granted her by her son. — *Comrs. of Forf. Estates v. Drummond*, Robert. 290 (1720); *Aff.*

59. A disposition by a father to his married daughter of heritable and moveable estate, in trust for herself in liferent and for aliment, and for her children, secluding her husband in the event of insolvency from the *jus mariti* and right of administration, and declaring the estate not liable for her debts or deeds, and naming trustees to act with the daughter in case of her husband’s insolvency, is effectual against creditors of the husband subsequent to insolvency, but the rents and income accruing prior to insolvency are attachable by the creditors. (Per Lord Mansfield)—This right (in the wife and children) is exactly similar to a trust in England for the sole and separate use of the wife and her issue. — *Annand v. Scott*, 2 P. 369 (1775); *Aff. M.* 5844. See 64, 65.

60. A marriage in England, the husband being at the time domiciled there, does not, except by express agreement, fix the rights of the spouses, in the event of the husband afterwards changing his domicile; and on the death of either after such change, the law of the domicile at the time decides all questions of personal succession. So also in re-

gard to the provinces of York and Canterbury. — *Lashley v. Hog*, 4 P. 581 (1804); *Rev. M.* 4628, 4619.

61. A contract of separation, whereby a wife accepts an annuity in full of all her legal claims on the husband's estate after his death, may be revoked by her after that event, on the ground of inadequacy. — *Hunter v. Dickson*, 5 W. & S. 455 (1831); *Aff.* 5 S. 266.

62. A husband having borrowed from his wife's trustees money conveyed to them for her, exclusive of the *jus mariti* as to principal and interest, granted bond for it with the like exclusion, on which bond adjudication was led at the wife's interest; held that the interest on the bond does not fall under the *jus mariti*. — *Robertson v. Robertson*, 7 W. & S. 526 (1835); *Aff.* 13 S. 442.

63. A widow having, by agreement with two of her sons, accepted from them certain payments which were substantially equal to the amounts granted her in a post-nuptial deed by her husband, as in lieu of her legal provisions, and having on receipt renounced in their favour all her claims, legal and conventional, against her husband's estate, she cannot retain or afterwards revert to her legal rights in competition with others of her children. — *Dixon v. Fisher*, 2 Robin. 345 (1841); *Aff.* 2 D. 1121. See 37.

64. An assignation by a wife, in security of debts due by her husband, of the interest of a fund vested in trustees for her use, which interest is declared to be alimentary only and not assignable, is void; observed that such an assignation by a wife without consent of her husband, though he was out of the country, would have been void, even if the fund had not been alimentary. A trustee with power to pay debts, and to apply so much of the interest of the residue as he deems advisable to the support of a married woman and her family, the fee being given to the children, is not entitled to assign the estate for payment of the husband's debts, reserving only a fixed aliment to the wife. — *Rennie v. Ritchie*, 4 S. Bell, 221; 12 Cl. & Fin. 204 (1845); *Rev.* 3 D. 192. See 59.

65. An insurance on the husband's life payable to the wife and her heirs, there being no marriage-contract, and it being only a reasonable provision, is not revocable, and is effectual against his creditors on bankruptcy, if he was solvent when it was entered into. — *Galloway v. Craig*, 4 M'L. 267 (1861); *Rev.* 22 D. 1211.

See BANKRUPT, 1, 20, 63—CONQUEST, 2—FEE AND LIFERENT, 17—HEIRS, 5—HERITABLE AND MOVEABLE, 5—LEGITIM, 2, 11—LIFERENTER, 3, 4, 5.

VII. COURTESY AND TERCE.

66. Reduction on the ground of informality of a wife's infestment

after her death does not bar the husband's courtesy. — *Hamilton v. Boswell*, Robert. 192 (1717); *Aff. M.* 3117. *See* 36.

67. Terce is not excluded by a revocable, but only by a conventional provision to the wife; but if the language of the revocable provision expressly or by implication declares that she shall not take both, she is put to her election. A conveyance of an estate in fee would not of itself put her to election, but if in liferent it would; and the case is the same whether the estate is in England or Scotland. — *Lowthian v. Ross*, 3 P. 621 (1797); *Rev. M.* 4631.

68. Terce does not extend to lands held burgage, being part of an estate of which the remainder is held fee. — *Lawson v. Maxwell*, 4 P. 464 (1803); *Aff.*

VIII. DIVORCE.

69. In an action of separation on account of cruelty, a proof of alleged calumnious statements was allowed to support the charge of cruelty; held, on the evidence, that the cruelty was not established. — *Moir v. Moir*, 6 P. 688 (1751); *Rev. Elchies, Husband and Wife*, No. 35.

70. In an action of divorce the alleged adulterer was admissible as witness against, or for, the defender. — *Nicolson v. Nicolson*, 3 P. 655 (1771); *Aff. M.* 12639, 16770. *Marshall v. Marshall*, 4 P. 72 (1779).

71. The defender in an action of divorce for adultery has a right to require that the particulars of time, place, and person shall be stated. — *Marshall v. Marshall*, 4 P. 72 (1799).

72. In order to support a plea of condonation or remissio the certain knowledge of the pursuer of the acts of adultery at the time she is said to have condoned them must be proved, and her statements of suspecting them, or a deed by the husband admitting them, but not proved to have been brought to her knowledge, are not sufficient. — *Legrand v. Stewart*, 2 P. 596 (1782); *Aff. See* 76.

73. Remit to consider the evidence of the husband's knowledge of the acts of adultery at the time when the condonation took place, and whether condonation can be pleaded while the adultery is denied. — *Fairlie v. Fairlie*, 6 P. 121 (1815); *Rem.*

74. Condonation by the husband is not established by a continuance of residence in the same house, the parties being separated at bed and board. — *Stedman v. Stedman*, 6 P. 675 (1742); *Aff. See M.* 7337.

75. Divorce granted on the ground of adultery, although the pursuer had previously instituted an action for damages against the alleged paramour, but in which the jury, subsequent to the sentence of divorce in the Court below, but prior to the judgment on appeal, found the

adultery not proven, and which verdict the Court refused to disturb. — *Boyes v. Baillie*, 3 *Bligh*, 491 (1821); *Aff.*

76. The creditors of the husband have no title to oppose a divorce sued for by the wife even as to its pecuniary effects, and though the adultery occurs after the husband's sequestration. Proof of collusion must be offered, if at all, before the oath of calumny is emitted. Condonation by the wife will not be implied while she had nothing more than suspicion of her husband's adultery. — *Greenhill v. Aitken*, 2 *S. Ap.* 435 (1824); *Aff.* 1 *S.* 296.

77. Withdrawal by a husband from the wife's society, refusing to allow her family or others to see her, or to allow her to go to church, and evident dislike of her, are not sufficient to entitle her to separation. Observed that the habitual use of opprobrious and insulting language, or encouragement to others to use such language, would alter the case. On reversal costs not given to the wife, respondent, but she is allowed to retain the costs given in the Court below. — *Paterson v. Russell*, 7 *S. Bell*, 337; 3 *H. L. Ca.* 308 (1850); *Rev.*

78. Divorce granted although the adultery was committed after a separation *a mensa et thoro*, and denied by the alleged paramour. — *Ritchie v. Ritchie*, 4 *M'Q.* 162 (1861); *Aff.*

79. When a domiciled Scotsman married in Gibraltar an Englishwoman, separated from her, under deed, in England, and continued to reside there; remit to consider whether he could sue a divorce in Scotland, in respect of acts of adultery alleged to be committed in England, or in Scotland, after separation. Opinions per Lord Eldon and Redesdale, that after the separation the *forum* of the wife did not follow that of the husband. — *Tovey v. Lindsay*, 1 *Dow*, 117 (1813); *Rem. M. Forum Com.* No. 6.

80. A domiciled Scotsman, marrying in England an Englishwoman, may sue a divorce in Scotland, on account of adultery committed abroad. Personal service on the wife abroad, and edictal service, is sufficient in such case, without service at the husband's dwelling-house in Scotland. A contract of separation is not a bar to a suit for divorce, and it does not affect the rule that the husband's domicile is the wife's. — *Warrender v. Warrender*, 2 *S. & M'L.* 154; 9 *Bligh*, *N.S.* 89; 2 *Cl. & Fin.* 488 (1835); *Aff.* 12 *S.* 847.

81. A sentence of divorce *a mensa et thoro*, obtained in England in the case of a Scottish or English marriage, is not a bar to an action for divorce in Scotland. — *Geils v. Geils*, 1 *M'Q.* 255; 2 *Stu. H. of L.* 13 (1852); *Aff.* 13 *D.* 321.

82. A divorce in Scotland of an English marriage, the parties not having become domiciled in Scotland except for the mere purpose of jurisdiction in the suit, is not effectual in England, and does not

operate as a divorce *a mensa et thoro*. Question, Whether after a separation the wife can acquire an independent domicile? — *Dolphin v. Robins*, 3 M.Q. 563 (1859); 7 H. L. Ca. 390; Aff. Ct. of Probate.

83. Divorce cannot be obtained by a husband in Scotland for adultery by the wife in England, unless the domicile of succession of the party suing has become Scottish. Question, Whether if it had, the wife remaining in England, the Scottish Courts could grant divorce? — *Pitt v. Pitt*, 4 M.Q. 627 (1864). See 30, 60.

See APPEAL, 86—EVIDENCE, 7.

INFECTMENT.

1. A charter containing a dispensing clause warranting infectment by the grantee, his heirs and assignees, in any part of the lands though discontinuous, carries the privilege to the disponee in liferent of part of the lands. — *Lyall v. Skene*, and *Ogilvie v. Skene*, 2 P. 138 and 141 (1768); Rev. M. 8792. See Reduction, 2.

N.B.—The judgment in the former case only extended to a point of practice in special circumstances.

2. Question, Whether the Crown can grant a clause of dispensation uniting lands for the purpose of infectment, of which part only were held of the Crown, and the remainder of the Prince. — *Whitefoord v. Whitefoord*, 3 P. 101 (1788); Aff.

3. A charter containing a clause of dispensation authorising sasine to be taken at the manor-house for the whole lands and every part thereof, warrants infectment at the manor-house in a single portion of the lands, though the manor-house does not lie within it. — *Morehead v. Edmonstone*, 3 P. 199 (1791); Aff. M. 8793.

4. Question, Whether on sale of part of a barony, sasine at the manor-place, which was unsold, was valid? — *Finlayson v. Innes*, 4 P. 443 (1803); Aff.

5. The benefit of a clause of union granted to heirs of entail enures to a heritable creditor taking sasine on the lands at the place designated in the clause. — *Ferrier v. Moubray*, 7 W. & S. 147 (1834); Aff. 10 S. 773.

6. A sasine need not mention the special symbols used in giving infectment, and the record need not contain the notary's sign and mark. The precept under the quarter seal on which a sasine proceeds need not be produced to support the sasine on its being challenged. — *Lord Advocate v. Urquhart*, Cr. & St. 586 (1755); Alt. M. 9915.

7. An error in a sasine as recorded in stating the designation of the writer of the deed on which it proceeded, and an error in stating that

the symbols were delivered to John Burn the foresaid procurator, while his name was previously given as John Bryce, are immaterial, the principal sasine being lost, so that it did not appear that the errors had not crept in in transcribing into the register. — *Lord Napier v. Livingstone*, 2 P. 108 (1765).

8. The omission in a sasine of the surname of one of the witnesses of the charter is not fatal. — *Lawrie v. Livingstone*, 6 P. 194 (1816); Aff.

9. It is no objection to a sasine that the witnesses sign only the last page. — *Duke of Hamilton v. Douglas*, 2 P. 449 (1779); Aff. M. 4358.

10. In a sasine the last syllable of the word Coble-house being written on an erasure throughout, the sasine is void. — *Innes v. Earl of Fife*, 2 W. & S. 637 (1827); Aff. 5 S. 559.

11. The non-insertion of the Christian name of the bailie by whom infetment is given is immaterial, and the writing the Christian name of one of the attesting witnesses on an erasure in the testing clause is also immaterial. — *Morton v. Hunters*, 4 W. & S. 379 (1830); Aff. 7 S. 172.

12. The words “and three” in the date 1803 being written on erasure, though agreeing with the year of the king, vitiates the sasine. — *Hoggan v. Ranken*, 1 Robin. 173 (1840); Aff. 13 S. 461.

13. It is doubtful if a precept of sasine can be used to contradict the charter. (Per Lord Redesdale.) — *Dixon v. Grahame*, 5 Dow, 266 (1817); Rem.

14. A sasine, null through being unrecorded, does not exhaust the precept. — *Kibbles v. Stevenson*, 5 W. & S. 553 (1831); Aff. 9 S. 233.

15. Infetment in fee-simple on a precept in a charter of tailzie is bad, and does not exhaust the precept. — *Cochrane v. Craig*, 2 Robin. 446 (1841); Aff. 16 S. 1332.

See DEED—ENTAIL, 19—PRESCRIPTION, 15—PROVING THE TENOR, 1—
SUPERIOR AND VASSAL.

INHIBITION.

1. The use of the word “bond” instead of “bonds” in the will of an inhibition, the narrative setting forth two bonds, does not deprive it of effect as to both bonds. — *Blackwood v. Allan*, Cr. & St. 640 (1737); Aff. M. 6991.

2. An order of the Court of Session recalling an inhibition as nimious and oppressive, and ordering it to be scored in the record and marked on the margin as done by authority of the Lords, affirmed as regards the recall, but *quoad ultra* reversed. — *Fullarton v. Hamilton*, 1 W. & S. 531 (1825); 2 S. 264.

3. An inhibition on a claim for meliorations by evicted purchasers against the heir in possession of an entailed estate, who has instituted a counter-suit for a much larger sum, recalled without caution. — *Agnew v. Bell*, 1 W. & S. 709 (1824); Rev. 4 S. 51.

4. An inhibitor is not entitled, on a sale in bankruptcy, to draw back full payment from a posterior heritable creditor infest, but only to draw back from him so much as will put the inhibitor in the same position as if the subsequent heritable security had not been granted. — *Gordon v. Campbell*, 1 S. Bell, 563 (1842); Rev. 3 D. 629.

5. An error in the entry of an inhibition in the records, consisting in a misstatement of the sum, although in other parts of the inhibition the sum is correctly stated, is fatal to it. — *Malcolm v. Mansfield*, 6 S. Bell, 359 (1849); Aff.

See ARRESTMENT, 3—ENTAIL, 173—FEE AND LIFERENT, 10—
HEIRS, 20—HUSBAND AND WIFE, 34.

INSURANCE.

1. An insurance against being drawn in a militia ballot does not make the underwriters liable if the ballot is void, or if the insured, being really exempt, does not state his exemption. — *Scott v. Macintosh*, 2 Dow, 322 (1814).

2. A building insured being warranted to be of the first-class, which implied that it had no pipe above two feet long leading into a chimney, and having, in fact, such a pipe, the policy is void. Observed that every material circumstance is matter of presumed warranty in insurance, but that express warranty applies equally to immaterial circumstances. — *Newcastle Fire Ins. Co. v. Macmorran*, 3 Dow, 255 (1815); Rev.

3. A loan by an insurance company on the security of a policy to be effected with them is a legitimate transaction, and it being alleged, on the one hand, that the policy had been allowed to expire, and on the other, that a bill had been given to the manager for payment of the premium due, which he had agreed to take for that purpose; remit to ascertain the facts, and to consider whether the directors or company could take a bill for such a purpose. — *North British Ins. Co. v. Barker*, 6 W. & S. 323 (1833); Rev. 9 S. 869.

See CONTRACT, 17—FOREIGN, 6—HUSBAND AND WIFE, 65.

INSURANCE, MARINE.

I. CONTRACT OF, . . .	p. 200	III. DEVIATION, . . .	p. 202
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I. CONTRACT OF.

1. A security being granted over a ship, in the form of an absolute sale, the original owner has still an insurable interest. — *Alston v. Campbell*, 2 P. 492; 4 Br. P. C. 476 (1779); *Aff.*

2. A ship in a foreign port being insured in this country at a certain sum, "without account," the underwriters are bound to pay it with deduction only for salvage, though it greatly exceeds the real value, and interest is due on the sum from the date of the decree of the Admiralty Court. — *M'Nair v. Coulter*, 2 P. 297; 4 Br. P. C. 450 (1773); *Rev. M.* 7106.

3. Under an agreement relative to a policy in time of war, the owners of a neutral vessel became bound that she should produce proof of being a neutral vessel, with neutral cargo, before a claim was made in case of capture; held that on capture and condemnation, in virtue of the want of a special proof of neutrality required by an ordinance of one of the belligerents, made at a time when it could not be known to either owners or insurers before the ship sailed, the underwriters were liable, it being admitted that the vessel had all proof usually required of neutrality. English Judges consulted. — *Lothian v. Henderson*, 4 P. 484 (1803); *Aff. M. Insurance*, Ap. No. 4.

4. The *Diana*, without letters of marque, having recaptured the *Lady Bruce* from the enemy, and the owners of the *Diana* having effected an insurance "upon the supposed salvage due to the *Diana* on the *Lady Bruce*, retaken and carried into Norway," and the *Lady Bruce* having been again captured; held that the terms in which the salvage is described as the subject insured were such as to make the policy inept and void. — *Smith v. Yelton*, 5 P. 139 (1806); *Rev. M.* 11962.

5. An insurance was effected in this country on a trading ship at sea, with liberty to call at a certain port. In former policies on the like voyage there had been liberty to call at other ports. On the day on which the policy was dated, she put into one of these other ports, and after sailing thence was lost, held that the underwriters were not liable; but as they had, in fact, incurred no risk from the contract being void *ab initio*, they were bound to return the premium. — *Elliot v. Wilson*, 2 P. 411; 4 Br. P. C. 470 (1776); *Rev. M. Ap. vol. i. Insurance*, p. 1, No. 1.

6. An insurance on a ship to sail to New Orleans, "to return 1 per

cent. if the voyage end at Pensacola," comes to an end on her arrival at Pensacola, if it appears that there was then no intention that she should proceed further, and that, in fact, she could not, the port of New Orleans being at the time closed to British vessels. — *Newbigging v. Macgregor*, 1 S. Ap. 1171 (1822); *Rev.*

7. An insurance to and from a "port in Spain" covers a loss in an open roadstead, without any artificial works of protection, but used commonly for discharging and loading vessels by means of small craft, and having a "port-captain," custom-house, "and "vice-consul of the port." — *Sea Ins. Co. v. Gavin*, 4 W. & S. 17; 4 Bligh, N. S. 578; 2 Dow & Clark, 125 (1830); *Aff.* 5 S. 525.

II. CONCEALMENT AND MISREPRESENTATION.

8. A policy is not rendered void by non-communication of a letter from the captain stating the great danger of capture on the intended voyage, such danger being a fact well known to the public, and causing the policy to be taken at a 25 per cent. premium. — *Thomson v. Buchanan*, 2 P. 592; 4 Br. P. C. 482 (1785); *Rev. M.* 7085.

9. On evidence of a probability of knowledge on the part of owners, at the time of effecting the policy, that the vessel had been captured, the insurance is void. — *Stewart v. Dunlop*, 3 P. 14; 4 Br. P. C. 483 (1785); *Aff.*

10. A policy is void if a leak, though stated to the underwriters, is more serious than they had been led to believe, and if, unknown to them, information has been received by the owners that the ship was overloaded and insufficiently manned. Putting into Elsinore from Stockholm to Dublin, to pay the duties, and get more hands and necessaries, is a deviation which avoids the policy. — *Campbell v. Russell*, 3 P. 340 (1794); *Rev.*

11. Non-communication of the statement of the captain of a vessel as to the date at which he expected her to arrive at her destination, does not avoid the policy. — *Smith v. Allan*, 5 P. 229 (1808); *Aff.*

12. Failure to communicate information respecting the amount of repairs which had been needed by the vessel, though she was afterwards certified as sea-worthy, and respecting the inactivity of the captain, which led to her failing, after the date of advice, to join convoy at the appointed time, and being consequently delayed and ultimately lost, held to avoid the policy. — *Smith v. Bogle*, 5 P. 248 (1809); *Rev. F. C.* 22 May 1804.

13. An insurance is avoided if the fact of the vessel having another as tender, which causes some delay, is not mentioned. — *Henderson v. Allan*, 5 P. 736; 1 Dow, 324 (1813); *Aff. F. C.* 20 Feb. 1812.

14. A statement to an underwriter at Leith, that the insurance had been partly effected at Lloyd's at a rate which was greatly under the rate actually paid at Lloyd's, avoids the policy. — *Sibbald v. Hill*, 2 *Dow*, 263 (1814); *Rev. F. C.* 10 *June* 1809.

15. The owners being well aware that the vessel to be insured was to sail without convoy, insured her at "ten guineas, to return five guineas for convoy and arrival;" held that the policy was void. Question, Whether concealment that she was a prize coming home for condemnation, avoided the policy? — *Reid v. Harvey (Nancy)*, 6 *P.* 197; 4 *Dow*, 97 (1816); *Aff.*

16. A vessel being insured from one foreign port to another, on advices received from the owner's agents at the port of departure, but the agents having changed her destination, and she being lost before sailing, of which facts the owners received information on the same day, but concealed the change, and recovered on the policy; held that they were bound to have communicated the change of destination, that it avoided the policy, and the underwriters were entitled to a return of the sum paid. — *Tasker v. Cunningham*, 1 *Bligh*, 87 (1819); *Rev.*

17. An insurance on 17th June, of a ship as having been intended to sail from a foreign port about 1st May, whereas, in fact, she had sailed on 23d April and been captured on 11th May, is bad for misrepresentation, though there was no fraud in the owners. — *Dennistoun v. Lillie*, 1 *S. Ap.* 22; 3 *Bligh*, 202 (1821); *Aff.*

18. A vessel being insured on 21st April, on a representation that she was on the point of sailing, and not having sailed till 8th June, and war being declared in July and the vessel being captured, the policy is void. — *Stirling v. Goddard*, 1 *S. Ap.* 238 (1822); *Aff.*

III. DEVIATION.

19. A deviation from the proper course, resulting in loss of the ship, must be clearly proved to have been wilful, or the insurance will remain valid. — *Grahame v. M'Nair*, 2 *P.* 244 (1770); *Aff.*

20. An insurance on a vessel to Rotterdam, with liberty to call at a port in England, is void if she is despatched with orders to discharge at a port in England not in the direct route to Rotterdam, except as to such of the underwriters as signed an endorsement of the deviation. — *Laird v. Robertson*, 3 *P.* 232; 4 *Br. P. C.* 488 (1791); *Rev. M.* 7099. *Same case*, 3 *P.* 443 (1796); *Aff.*

21. Where the original destination in the charter-party was to Rotterdam, but the charterer's agents gave the captain power to proceed to London or Newcastle, the difference of freight being to be

settled by arbitration, an insurance on the freight to London or Newcastle is valid. — *Hall v. Brown*, 2 Dow, 367 (1814); *Aff. F. C.* 2d Feb. 1810.

22. Evidence of a letter from the master, making statements as to the cause of deviation and delay, admitted, though the letter itself was not produced, and an official protest by him in a foreign port held sufficient to prove justifiable deviation, though it would not be so in England. In case of damage to cargo, the best way of ascertaining it is by sale, but a valuation is admissible. — *Smith v. Macneil*, 2 Dow, 538 (1814); *Aff.*

23. A policy of insurance on a vessel, with liberty to her to touch and stay at any port on the voyage, is not vacated by an accident which causes her to be brought back to the port from which she sailed, but continues on her sailing a second time, nor is it vacated by the occurrence of circumstances which, it is alleged, would make it necessary for her to deviate from the intended voyage, if, in fact, the loss takes place before the deviation takes place, and no intention to deviate was formed prior to sailing. — *Brown v. Maxwell*, 2 S. Ap. 373 (1824); *Rev.* 1 S. 403. See 5, 10, 16.

IV. SEAWORTHINESS.

24. A vessel which had been lengthened fourteen feet, the addition being without knees, and the rigging and tackle being left unaltered, held unseaworthy. — *Watt v. Morris*, 5 P. 697 (1813); 1 Dow, 32; *Rev.*

25. Although a ship is to be presumed seaworthy, yet when having, after sailing, without any severe stress of weather, become leaky and put back, the *onus probandi* of being seaworthy at the time of sailing lies on the owners, and on failure the insurance is void. — *Robinson v. Clark* (*Midsommer Blossom*), 5 P. 698; 1 Dow, 336 (1813); *Rev.*; *Parker v. Potts* (*La Gloire*), 3 Dow, 24 (1815); *Rev.*; *Wilkie v. Geddes* (*Mary*), 3 Dow, 57 (1815); *Rev.*; *Douglas v. Scougall* (*North Star*), 6 P. 179; 4 Dow, 269 (1816); *Aff. Campbell v. Hamilton* (*Sarah*), 6 P. 219 (1816); *Aff.* See 12.

26. A vessel is not seaworthy if the best bower anchor and the cable of the small bower anchor are defective. — *Wilkie v. Geddes* (*Mary*), 3 Dow, 57 (1815); *Rev.* See *F. C.* 16th Feb. 1816.

V. ABANDONMENT.

27. The vessel having been taken possession of by mutineers, and the cargo having been sold by government officers on her recapture, before she could be recovered by the owners, they are entitled to abandon, and abandonment being duly intimated is not waived by

their acting afterwards for the benefit of the underwriters. — *Brown v. Smith*, 5 P. 718 ; 1 *Dow*, 350 (1813) ; *Rev.*

28. A vessel being captured, and notice of abandonment being given to the underwriters, and accepted by them, it is not competent for them, on receiving intelligence of her recapture, to claim to settle as for only a partial loss. Question as to the law in case the underwriters had not first accepted the abandonment. — *Smith v. Robertson*, 2 *Dow*, 474 (1814) ; *Aff.*

29. The owners after having received advice of their ship having put in for repairs into a foreign port, and being under repair, and permitting her to be freighted thence, without notice of abandonment, cannot afterwards claim for a total loss. — *Fleming v. Smith*, 6 *S. Bell*, 278 ; 1 *H. L. Ca.* 513 (1848) ; *Aff.* 8 *D.* 627. See Shipping, 1.

30. A ship is totally lost when the cost of repairs would be greater than her value when repaired, and as such she may be abandoned, though the injury is received at the entrance to the dock, but on such abandonment any freight earned belongs to the underwriters. — *Stewart v. Greenock Marine Ins. Co. (Laurel)*, 1 *M'Q.* 328 ; 2 *H. L. Ca.* 159 (1848) ; *Aff.* 8 *D.* 323.

31. Although a ship may be abandoned to the underwriters as a total loss, yet if she actually delivers her cargo, and so earns freight for the underwriters, the owners have no claim against the underwriters of freight for the amount so earned, as it is not a case of loss of freight. — *Scottish Marine Ins. Co. v. Turner (Laurel)*, 1 *M'Q.* 334 ; 2 *Stu. H. L.* 46 (1853) ; *Rev.* 13 *D.* 989. See Shipping, 8.

INTERDICT.

1. In a petition and complaint for breach of interdict granted by the Lord Ordinary, claiming damages, or fine and imprisonment, it is competent for the Court to renew and modify the interdict. — *Mags. of Dingwall v. M'Kenzie*, 5 *W. & S.* 351 (1831) ; *Aff.* 7 *S.* 899.

2. Interdict is not to be granted where the parties against whom it is sought have not done or threatened to do anything inconsistent with the petitioner's rights. — *Weir v. Glenney*, 7 *W. & S.* 244 (1834) ; *Aff.* 10 *S.* 290.

3. A railway company having been interdicted from entering certain lands for informality, and having cured the informality and entered before applying for recall of the interdict, held that this was a breach, but only a technical breach, and the Court having fined the company and directors L.300, the fine against the directors was reversed, and against the company reduced to 40s. Costs of the appeal not given, as

the judgment was materially altered. — *Caledonian Ry. Co. v. Hamilton*, 7 S. Bell, 272 (1850); *Alt.*

4. An interdict will not be granted against a railway company taking steps to procure its dissolution, it having never commenced operations on the works, at the instance of a landowner on the line, with whom an agreement as to the deviation of the proposed line had been made before the bill was procured, but who has failed in the Court below in a declarator of his right to compel them to proceed. The House will not allow the material part of the interdict sought to be abandoned merely to save dismissal. — *Anstruther v. East of Fife Ry. Co.*, 1 M'Q. 98; 1 Stu. 691 (1852); *Aff.* 12 D. 127.

See BURGH, 36, 37—COPYRIGHT, 2—CORPORATION, 4—LANDLORD AND TENANT, 18, 46, 64—LIBEL, 8—MASTER AND SERVANT, 5—NUISANCE—PROPERTY, 26—SALMON, 24—SHERIFF, 4.

INTEREST.

1. Interest is not due on an acknowledgment of debt without express stipulation. — *Garden v. Rigg*, Cr. & St. 409 (1748); *Aff.*

2. Bonds granted in terms of an Act of Parliament, which does not declare that they shall carry interest, do not bear interest. — *Haldane v. Elphinston*, 2 P. 546 (1780); *Aff.*

3. The Court of Session, affirmed by the House of Lords, having fixed the amount of salary past due, on an indefinite engagement, to the manager of a glass-work, interest does not run on the arrears prior to the amount being so fixed by the Court of Session. — *Wallace v. Geddes*, 1 S. Ap. 42 (1821); *Rev.*

4. Per Lord Wynford: "I wish that, with regard to interest on money lent, the English law were assimilated to the Scotch." Interest given on arrears of a bond of annuity which had been delivered back by the grantee in a fit of insanity. — *Marquis of Bute v. Cooper*, 4 W. & S. 335 (1830); *Aff.* 5 S. 831, and 7 S. 223.

5. The House having declared that the holder of bonds in India was chargeable with the interest due upon them, and at the rate of 12 per cent. from the time they were paid, subject to deduction of the charge of remittance from India, this deduction only extends to commission and exchange, and does not include a year's interest, which was alleged to be lost by the ordinary form of remittance, in the shape of twelve month's bills. — *Keble v. Graham*, 4 W. & S. 166; 7 Bligh, N. S. 410 (1830); *Rev.* 6 S. 119. See *Executor*, 4.

6. Debts being incurred by a Scotsman in England, and his wife having, after his death, undertaken to pay them, interest is to be com-

puted as by the law of England, and allowed therefore on debts by bond or bill, but not on those standing on open account. — *Lady Montgomery v. Rundell*, 12 *Dow & Clark*, 297; 5 *W. & S.* 201 (1831); *Aff.* 8 *S.* 286. See *Action*. 145.

7. Compound interest not allowed on an heritable bond, though recovery of payment on it had been impeded by fraudulent transactions of the debtor with the creditor while in a state of imbecility. — *M'Neill v. M'Neill*, 4 *W. & S.* 455; 2 *Dow & Clark*, 454 (1830); *Rev.* 4 *S.* 620.

8. The holder of an heritable security, being also executor of the debtor, is in neither capacity entitled to commission on the proceeds on selling it. Being a banker, and allowed by the other creditors to retain the balance pending a settlement, he is liable to them for interest at 5 per cent., but not for the bank profits. — *Robarts v. Court*, 3 *S. & M'L.* 317; 6 *Cl. & Fin.* 65 (1838); *Aff.* 13 *S.* 173.

9. An account opened with a mercantile house in India, on which Indian interest was allowed, being closed, leaving a balance due by the company, of which an account was furnished, bearing a docquet that it should bear interest at 9 per cent., the account is thus liquidated, and interest at the said rate is due until paid, although not paid for many years, but compound interest is not due by the law of England, which, in the absence of special custom, regulates Indian transactions. — *Fergusson v. Fyffe*, 2 *Robin.* 267; 8 *Cl. & Fin.* 121 (1841); *Aff.* 16 *S.* 1038.

10. Under an agreement that 4 per cent. should be allowed on a debt ascertained as due by agreement till it should be paid, the Court cannot allow 5 per cent. after the lapse of two years, on the ground that it was intended it should have been paid before then. The agreement having also provided that a stated sum should cover expenses, past and future, this applies to expenses incurred in establishing a certain item of the debt which was disputed. — *Scott v. Sandeman*, 1 *M'Q.* 293; 1 *Stu.* 882 (1852); *Rev.* 11 *D.* 405.

See ADJUDICATION, 1, 2, 6—BANK, 6—CONVEYANCING, 20—FACTOR, 1, 3—HUSBAND AND WIFE, 59, 62—INSURANCE, MARINE, 2—PROVISION TO CHILDREN—SECURITY, 1, 11—STAMP, 3.

JUSTICES OF PEACE.

1. The statute, 24 Geo. II. c. 44, limiting actions against justices of peace to six months, though not expressly restricted to England, does not extend to Scotland. — *Duke of Douglas v. Lockhart*, 6 *P.* 706 (1755); *Rev.* M. 7638.

2. Held that the postmasters of a town, agreeing to raise their rates,

might be punished for illegal combination; but that the justices had no power to fix the rates. — *Smith v. Scott*, 4 P. 17 (1798); *Aff. M.* 7625.

3. Remit to review an interlocutor referring to the Lord Advocate to consider the propriety of one guilty of assault being retained in the Commission of the Peace, or of his being bound over to keep the peace; but observed afterwards that such remit should not have been made. — *Macdonell v. Macdonald*, 2 Dow 66 (1813); 2 Dow 285.

4. A justice of peace is liable to an action of damages for slander on account of words spoken on the bench, where malice is proved, but evidence of the malice must be given besides the words. (Per Lord Wynford)—Malice may be inferred by a jury if a magistrate employ an agent to prosecute a case which he is to decide. — *Allardice v. Robertson*, 4 W. & S. 102; 1 Dow & Clark, 494 (1830); *Rev.* 7 S. 601. See Court of Session, 11.

5. A depute-clerk of justices of peace having brought before them a complaint, in his character as clerk also of road trustees, and prosecuted it by a clerk of the firm of which he was a member, he was suspended by the Court of Session from his office for a twelvemonth; but the House considering this too severe, recalled it, and inflicted upon him, by way of penalty, payment of costs amounting to L.269. — *Campbell v. M'Farlane*, 4 W. & S. 123 (1830); *Alt.* 5 S. 537.

6. A justice of the peace may take an affidavit although out of Scotland. — *Kerr v. Marquis of Ailsa*, 1 M'Q. 736 (1854); *Aff.* 14 D. 864.

7. A party apprehended on an offence triable by a justice of the peace is not entitled to object to undue detention while the officer is in search of a justice to hear it, although, from the refusal of several justices, such detention lasts for two days, and is at the prison of the town, and the jurisdiction of the justice is not affected by such delay. — *Evans v. M'Loughlan*, 4 M'Q. 86 (1861); *Rev.* 21 D. 532.

See ADMIRALTY, 3—BURGH, 16—COURT OF SESSION, 4—STATUTE, 22.

LANDLORD AND TENANT.

I. LEGAL RELATIONS, . . .	p. 207	V. CONSTRUCTION OF LEASE, . . .	p. 213
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I. LEGAL RELATIONS.

1. The right of the kindly tenants of Lochmaben to possess in perpetuity and convey to singular successors, sustained, though not founded

on charter and sasine. — *Viscount Stormont v. Henderson*, Cr. & St. 77 ; 8 Br. P. C. 270 (1732) ; Aff. M. 15195.

2. A lease for 1140 years on a grassum, on which infestment has been taken, with possession for above forty years, is valid against singular successors, or against the Crown on attainder of the landlord. — *Frazer v. Lord Advocate*, 2 P. 66 (1762) ; Rev. M. 15196.

3. There is no objection in law to a lease renewable every nineteen years on payment of a fine or grassum. — *Scott v. Straton*, 3 P. 666 (1772) ; Aff. M. 15200.

4. Improving leases at an under rent, and for a term of fifty-seven years, not commencing for fifteen years after date, granted by a man of eighty-eight years of age ; held not reducible, facility and lesion not being proved. — *Viscount Arbutnott v. Gillies*, 4 P. 1 (1797) ; Aff. C. S. 1797.

5. After decree of removal of tenants, but before the term of their removal, the landlord sold the estate ; held that the purchaser, though uninfest, might remove the tenants at any subsequent term, as in respect of the former decree their possession could be ascribed only to the permission of the new landlord. — *Finlayson v. Innes*, 4 P. 443 (1803) ; Aff.

6. When a tenant has accepted new buildings as sufficient, he is not entitled to damages on their being blown down. — *Lord Kinnaird v. Mathewson*, 4 P. 429 (1802) ; Rev.

7. In a lease of salmon-fishings with absolute warrandice, so far as the several stations had been hitherto fished or occupied, the lessee is entitled to damages if the lessor, by any operations, injures one of the stations, although the rest are still of value equal to the whole when let. — *Hall v. Ross*, 5 P. 729 ; 1 Dow, 201 (1813) ; Rev.

8. A tenant cannot call upon the landlord to rebuild a house burned down by accident, although he may be entitled to abatement of rent. The tenant, though bound to repair and uphold, is not liable to rebuild in such case. Question, as to what is negligence occasioning the fire. — *Bayne v. Walker*, 6 P. 217 ; 3 Dow, 233 (1815) ; Rev. F. C., 30 May 1811. See *Superior and Vassal*, 25.

9. A tenant having agreed to renounce his lease at a future date for a certain sum, and meantime to observe a particular method of cropping, which he did ; but the landlord having become bankrupt before arrival of the period of surrender, and his trustees having advertised the farm as to be let from that period, this does not amount to personal or official homologation of the agreement, and the tenant can only rank as a creditor for the price of renunciation, or retain his lease and sue the landlord for damages for non-implement. — *Ferrier v. Hector*, 1 S. Ap. 159 (1822) ; Rev.

10. The sheriff has power to declare a conventional irritancy as one of the conclusions of a process of removing, and such irritancy is sufficiently libelled if the lease itself is libelled. A removing is competent, though the landlord is in possession, if the tenant threatens to re-enter. — *Taylor v. Boyle*, 2 S. Ap. 30 (1824); Aff.

11. A singular successor is bound by stipulations in a lease for repayment to the tenant of meliorations, and the tenant may retain the keys of the houses until the landlord agrees to a valuation being made. — *Fraser v. Maitland*, 2 S. Ap. 37 (1824); Aff.

12. Damages are not due for miscropping after the termination of a lease, unless notice has been given to the tenant at the time. — *Fraser v. Maitland*, 2 S. Ap. 37 (1824); Aff.

13. A party taking a lease of the lower mill of three belonging to the lessor, who had advertised them as having an abundant supply of water, is not entitled to refuse payment of his rent on the ground of an alleged deficiency, which, if it exists, is due to the illegal conduct of the tenant of the highest mill; but he may have a right to damages against such upper tenant. — *Aitchison v. Mags. of Glasgow*, 1 W. & S. 153 (1825); Aff. 1 S. 503.

14. A landlord having let a paper-mill, but made no objection to its use as an oil-mill for five years, and as a flour-mill for one, is not entitled to require it to be restored to use as a paper-mill. — *Young v. Ramsay*, 1 W. & S. 560 (1825); Aff. 2 S. 793.

15. A landlord is entitled to sequestrate for rent, and bring an action of mails and duties at the same time, although the lease contains, in addition, a clause of registration for diligence; but costs not allowed on account of the hardship of the case. (Per Lord Cottenham)—The landlords ought to give the tenants some relief from the pressure of the law of hypothec for rent. — *Pentland v. Booth*, 5 W. & S. 228 (1831); Aff. 8 S. 196.

16. A tenant cannot refuse to pay his rent to a creditor infest in security on the estate, who brings an action of mails and duties, on the ground that the proprietor has subsequently disposed the estate to a trustee for himself, who has sequestered for rent, for the latter right is clearly postponed to the former. — *Pentland v. Booth*, 5 W. & S. 228 (1831); 8 S. 196.

17. A tenant, as well as a landlord, is bound to give forty days' notice of his intention to remove on the expiry of a lease for years, otherwise he will be liable by tacit relocation; and notice to a factor appointed to receive the rents, but who replies that he has no authority to receive such notice, is not sufficient. Whitsunday is the 15th, not 26th May. — *M'Intyre v. M'Nab's Trs.*, 5 W. & S. 299 (1831); Aff. 8 S. 237.

18. The extent of ground and other pertinents contained in a lease having been made the subject of a submission, and the arbiters having found that a piece of ground should be included for the purpose of a stance for a straw stack, and a right of way allowed over a road, interdict is competent against the erection by the tenant of sheds or houses on the piece of ground or the road. — *Walker v. Grant*, 1 *Robin.* 154 (1840); *Aff.* 1 *D.* 38.

See infra (ASSIGNATION OF LEASE); also ACTION, 11—APPEAL, 118—BANKRUPTCY, 4, 49, 75, 76—COAL—CONVEYANCING, 21—24—ENTAIL, 111—132—HERITABLE AND MOVEABLE, 10—LIFERENTER, 4—MINES AND MINERALS, 1—NUISANCE, 2—PUBLIC WORKS, 24—STATUTE, 29.

II. HYPOTHEC.

19. An arrestment on a Crown debt has preference over the landlord's hypothec. — *Ogilvie v. Wingate*, 3 *P.* 273; 6 *Br. P.C.* 498 (1796); *Rev. M.* 7884.

20. Hypothec extends over grain sold two years before by sample, in open market, and delivered and paid for at the time. — *Smart v. Ogilvy*, 3 *P.* 490; 4 *Br. P.C.* 498 (1796); *Aff.*

21. A *bonâ fide* purchaser of grain from a tenant, for which he has paid the tenant, is liable to second payment to the landlord under his hypothec, if the sale has been by sample in a market where grain is usually sold in bulk. Affirmance without costs. — *Dunlop v. Earl of Dalhousie*, 4 *W. & S.* 420; 7 *Bligh, N.S.* 422 (1830); *Aff.* 6 *S.* 626.

22. Premises being let at a certain rent, and with an agreement that the tenant should pay a further annual sum to be fixed by arbitration, for the use of steam-power and water communicated from an adjoining building, this last sum is not rent for which the landlord can exercise his hypothec, or (in England) distrain. Opinion that it is not a covenant running with the land. — *Catterns v. Tennent*, 1 *S. & M'L.* 694 (1835); *Rev.* 12 *S.* 686.

23. A landlord is not bound to withdraw a sequestration for rent on receiving from a third party an offer to pay the amount on receiving an assignation to the sequestration. — *Gordon v. Graham*, 2 *Robin.* 251; 8 *Cl. & Fin.* 107 (1841); *Alt. F. C.* 2d February 1841.

See 15, 16, 41—CAUTIONER, 24.

· III. CONSTITUTION OF LEASE.

24. Tenants in possession having made a written offer of lease, which the landlord's factor accepted as regards rent and duration, but reserved for adjustment questions of steelbow and entry, &c., and afterwards sent them a lease to be signed, which they did, and continued in

possession in accordance with it, it is binding on a prior incumbrance, though not signed by the landlord. — *Stewart v. Countess of Moray*, 2 P. 317 (1773); *Rev. M.* 4392.

25. Where lands are let subject to general conditions applicable to many farms, and accepted by a docquet, the Court will construct the actual lease so as best to carry out the conditions in so far as applicable. — *Stratton v. Graham*, 3 P. 119 (1789); *Rem. F. C.* 13th Dec. 1811, *note.*

26. Possession will not support a lease granted by an informal writing, unless it is attributable solely to the writing; thus an informal agreement for a new lease to commence after expiry of the old one will not be supported by possession attributable to the old lease. — *Kerr v. Redhead*, 3 P. 309 (1794); *Rev. Bell, Ca.* 202.

27. A government board vested in a forfeited estate having by minute “proposed to grant a lease as prayed for, on the usual conditions,” to the widow of the attainted party, whom failing, to his daughter, but on which no possession followed, and the estate being afterwards restored to her son, and sold by him, the daughter has no claim under the lease against the purchaser. — *M’Lean v. Cameron*, 3 P. 474 (1796); *Aff.*

28. An offer of lease in writing, retained by the landlord, and followed by possession on the part of the tenant, is binding, and cannot be controlled by conditions not intimated by the landlord as to the terms. — *Keir v. Duke of Atholl*, 6 P. 131 (1815); *Rev.*

29. A parole agreement that the tenant should get another farm on being removed from one he at the time held, on being established in a declarator, is sufficient to bar his removal from the substituted farm, although he had obtained possession of it on a different title from the agreement; but question, whether, had he not been in possession of the substituted farm, he could have obtained possession under an agreement which was uncertain as to rent and other conditions. — *M’Donnell v. Cameron*, 2 W. & S. 592 (1827); *Aff.* 3 S. 340.

30. A reference in a lease to conditions of articles of lease, held as repeated as part of the lease, is sufficient to make them binding. Possession under a draft signed as approved of, but not probative, makes it equivalent to a probative deed. — *Gordon v. Anderson*, 3 W. & S. 1; 3 *Bligh, N.S.* 351 (1828); *Aff.* 4 S. 13.

31. The tutor of a pupil having authorised a tenant to have a building lease prepared of the ground he already occupied on an agricultural lease, which some years afterwards the tenant did, the pupil (then minor) marking the draft as approved, and the former tutor signing the extended deeds, but no apparent change of possession having ensued; held that the building lease was ineffectual. — *Pentland v. Murray*, 5 W. & S. 28 (1831); *Aff.* 7 S. 502. *See Minor*, 2.

32. Letters establishing a tenancy, if in existence, must be produced to prove it in an action, not as against the landlord, but as against an adverse possessor of part of the ground, and must be stamped as a lease. Opinion, that even if stamped they would be useless as against the actual possessor, as the sole remedy would lie against the landlord. — *Hutchinson v. Ferrier*, 1 *M^cQ.* 196; 1 *Stu.* 677 (1852); *Aff.* 13 *D.* 837.

See PRINCIPAL AND AGENT, 14—TRUST, 8—WRITTEN DOCUMENT.

IV. ASSIGNATION OF LEASE.

33. The heir of a lessee can reduce an assignation of the lease without service. — *Scott v. Cochrane*, 6 *P.* 719 (1759); *Aff.*

34. A landlord is not entitled, on a lease, containing a power to assign to assignees to be approved of by the landlord, passing to the trustee in the tenant's sequestration, to require the insertion of new conditions before recognising the assignation. — *Irvine v. Valentine*, 3 *P.* 287 (1793); *Aff.*

35. After assignation of a lease, the assignor still remains bound to the landlord as a security for the rent. (Per Lord Thurlow.) — *Kerr v. Redhead*, 3 *P.* 309 (1794).

36. A decree of removing against a tenant is effectual against a sub-tenant holding a sub-lease of part of the subjects, sub-letting being authorised by the principal lease, but with the declaration that the principal tenant should remain liable for the rent of the whole. — *Grant v. Earl of Morton*, 3 *P.* 145 (1789); *Aff.*

37. A lease to a tenant and his heirs, secluding assignees, does not warrant the tenant in assigning the lease, *mortis causa*, to his second son, but on the landlord accepting the assignee the heir cannot object. — *Greive v. Cunninghame*, 4 *P.* 571 (1804); and 6 *P.* 16 (1814); *Rem. M.* 15298, and *App. Tack*, No. 9.

38. Under a lease to the tenant and his heirs, but secluding assignees, the tenant's heir entering *cum beneficio inventarii*, and allowing a committee of the deceased tenant's creditors to manage the farm, does not incur a forfeiture, and at any rate, on such arrangement being brought to an end, the heir cannot be removed. — *Earl of Galloway v. M^cHutchon*, 5 *P.* 169 (1807); *Aff.*

39. A lease being granted for thirty-eight years and the life of the party in right of it at the end of such period, and the power to assign being limited to be exercised within twenty-nine years from the entry, failing which the tack was declared to fall to the heir of the person in right to it at the end of such twenty-nine years, it does not descend to such heir after the lapse of the thirty-eight years and the death of the party then in right of it. — *Carnegy v. Scott*, 1 *S. Ap.* 114 (1822); *Rev.*

40. It is incompetent for a joint-tenant in a lease secluding assignees, to assign his interest to his co-tenant. — *Taylor v. Fairlie*, 2 W. & S. 101 (1826); Aff. 4 S. 450.

41. Sequestration for rent may proceed at the instance of the landlord against a sub-tenant, for the amount of the rent due by the principal tenant, and may stand for such balance of rent, however trifling, as may be found due by the Sheriff, including road money and other dues as per agreement for lease. — *M'Donell v. Cameron*, 2 W. & S. 595 (1827); Rev. 3 S. 341. See also 6 S. 65.

42. Question, Whether an assignation of a lease intimated to and accepted by the landlord, but not followed by any apparent change of possession, the assignee having let the subjects to the assignor, is valid against creditors of the assignor. — *Cabbell v. Brock*, 3 W. & S. 75 (1828); Rem. 2 S. 52. See Assignation, 11.

43. An assignation in security of a long lease published at the market cross and registered in the Sheriff-Court Books, but not intimated to the landlord nor followed by charge of possession, is, if not collusive, not reducible by a creditor of the assignor on his bankruptcy. — *Malcolms v. Young*, 3 W. & S. 404 (1829); Rev. 2 S. 158, and 3 S. 388.

44. Assignation of a lease to a creditor, who intimates it to the landlord, but grants a sub-lease to the assignor, on which he continues in possession without payment of rent to the assignee, is not valid as against other creditors. — *Cabbell v. Brock*, 5 W. & S. 476 (1831); Aff. 8 S. 647.

45. In a tack granted to the lessee, his heirs, assignees, and sub-tenants, with warrandice to him and his foressaids, the warrandice does not avail to a sub-tenant. — *Montgomerie v. Maxwell*, 5 W. & S. 771 (1831); Rev. 5 S. 935.

46. Under a lease secluding assignees and creditors, the landlord allowed the tenant, for two years after his sequestration, to retain possession, and accepted rent from him and from a partner whom he assumed. Held that he could not thereafter, in conjunction with the trustee, obtain an interdict against the tenant and his partner continuing in possession. — *Borrows v. Colquhoun*, 1 M'Q. 691 (1854); Rev. 14 D. 791.

V. CONSTRUCTION OF LEASE.

I. Entry and Removal.

47. A lease of teinds having been granted to one for life, and to his son for three nineteens, the entry to both being declared to be the same day, the three nineteens run from that day. A tack cannot be intro-

duced in the middle of a former tack without annulling it. — *Burnet v. Mags. of Aberdeen, Cr. & St.* 305 (1741); *Aff.*

48. In a lease the dispositive clause bore “for fifty-seven years in the option of the lessee, and upon the provisions and conditions after mentioned.” One of the subsequent conditions was to renounce on the expiry of nineteen years, or prorogue the same for three years, in the option of the lessor and lessee. Held that the landlord could not remove the tenant at the end of nineteen years against the tenant’s will. — *Lord Falconer v. Lawson*, 2 P. 442 (1778); *Aff.*

49. In a lease for fifty-seven years an obligation on the tenant to renounce before the expiry of the first nineteen years, or prorogue the same for three years in the option of the lessor and of the lessee, held to import a power to either landlord or tenant to renounce. — *Lord Falconer v. Lawson*, 6 P. 799 (1778); *Rev.*

50. A lease provided that on two terms’ rent falling into arrear, it should become *ipso facto* void, and also provided a penalty of one-fifth in case of failure in payment; held that when the tenant had regularly tendered his rents except when prevented by proceedings of the superior against his landlord, neither the irritancy nor penalties were incurred. — *Hogg v. Hogg*, 2 P. 516 (1780); *Aff.*

51. A lease for nineteen years from Whitsunday, binding the tenant at the Whitsunday of its expiry to remove, does not allow him to take a waygoing crop in that year, and the custom of the country is inadmissible as evidence to alter the rule. — *Scott v. Brodie*, 4 P. 311 (1802); *Alt. M. Tack, Ap. No. 8.*

52. Under a lease to expire at Whitsunday, a question as to liability for payment for the crop grown in that year, and reaped by the tenant, decided by evidence of the number of crops for which rent had been paid, and of payment of a price by the tenant for the crop in question. — *Thomson v. Forrester*, 4 W. & S. 136 (1830); *Aff.* See Conveyancing, 17.

53. Under a lease for the tenant’s life, binding his heirs to remove at the first Whitsunday after its expiration, they are not entitled to sow crops after his death, but before the period of removal. — *Marquis of Tweeddale v. Murray*, 6 S. Bell, 125 (1847); *Rev.* 8 D. 411.

54. A lease commencing at Whitsunday for the houses and grass, and at the separation of the crop from the ground as to the arable land, and renewable on six months’ notice before the expiration of nineteen years, is to be held as expiring at Whitsunday. — *Wight v. Earl of Hopetoun*, 4 M’Q. 729 (1864); *Aff.* 1 Macph. 1037.

See 17, 67–72.

2. *Subjects and Improvements.*

55. A lease having stipulated a rent of L.600, and that four years of

tillage should be succeeded by four years of grass, and that not above 300 acres should be under tillage in any one year, and the tenant having averred that he was led to understand that there were 600 acres on the farm, while by measurement it was subsequently ascertained there were only 440, although it was proved that he had spent a week in personal examination of the farm; held, 1st, That the lease was reducible by the tenant; 2d, That for the years in which he held it he was liable for rent at the rate of L.450 per annum; 3d, That there were no claims of damages competent to the landlord for miscropping, or to the tenant for loss from entering on the farm. — *Riddell v. Grosset*, 3 P. 203 (1791); *Rev.* See 63.

56. Quarries being let by a general name, under which the previous lessee had possessed a special quarry, and this being worked by the new lessee without challenge for five years, the landlord is barred from maintaining that it was not let. — *Stewart v. Bell*, 3 P. 158 (1790); *Aff.*

57. A missive of lease bound the tenant to pay 30s. for every acre, the measurement to be afterwards ascertained; held that he was not entitled to any deduction for land occupied by roads, steading, or corn-yard, or rendered unarable. A tenant, taking a farm by its boundaries, but which is also described as formerly possessed by certain tenants, is not entitled to the same seat in church which they occupied, but only to a sufficient seat. — *Lord Kinnaird v. Mathewson*, 4 P. 429 (1802); *Rev.*

58. A lease and relative obligation having given to the lessee and his assignees the right to a feu of all houses he or they might erect during the lease; held that this entitled him to grant feu-charters for building over the whole of the premises. — *Balderstone v. Hamilton*, 5 P. 234 (1808); *Aff.*

59. A stipulation in a lease that the tenant should keep in repair all the houses set, and be at liberty to erect additional steading, for which he should be entitled at the expiry to have allowance of the value, does not warrant him in pulling down old houses without building new ones in substitution, and entitles him to compensation for only so much as is in addition to and not merely substituted for the original buildings; but such value is to be estimated as at the expiry of the lease, irrespective of the amount actually expended. — *Sinclair v. Manson*, 1 S. Ap. 1; 3 *Bligh*, 21 (1821); *Alt.*

60. A lease reserving power to feu the whole or any part of the lands excludes all evidence of the practice of the estate as to the amount usually feued, or the terms on which the feu might be granted. — *Stewart v. Lead*, 1 W. & S. 68 (1825); *Rev.*

61. A lease provided that the houses and biggings on the farm should

be valued at entry and again at expiry, and the tenant paid for any improved value ; held that this does not apply to new houses erected by the tenant during the lease. — *Graham v. Jolly*, 5 W. & S. 280 (1831) ; *Rev.* 6 S. 236, and 7 S. 824.

62. A tenant having stipulated in his lease to be provided with a new road, and after his entry a public road having been so altered as to be equally convenient for his use, the landlord is not bound to provide the new road, nor liable in the stipulated deduction of rent till it is made. — *Burns v. Stewart*, 5 W. & S. 356 (1831) ; *Aff.* 8 S. 641.

See 11, 18—CONVEYANCING, 21–24.

3. *Miscropping.*

63. A stipulation that if the tenant cropped otherwise than as agreed on, he should pay 40s. per acre additional rent, is not a penalty which will be modified. But where the extent of acreage to which the stipulation applied was doubtful, remit made to ascertain it. — *Stratton v. Graham*, 3 P. 119 (1789) ; *Rem. F. C.* 13th Dec. 1811, *note.* *See* 55.

64. A lease binding the tenant to a certain mode of cropping, or to pay an additional rent for any deviation, does not give him the option, and the landlord is entitled to interdict against a deviation. — *Craigie v. Mackenzie*, 6 P. 117 (1815) ; *Aff. F. C.* 18th June 1811. *See* Pawnbroker.

65. Penal rent is due for non-observance of the rules of the lease as to the three last years of possession, although the departure was in compliance with the general system of the estate, and the landlord had been cognisant of it and made no objection till the last year. But acceptance by the landlord of the ordinary rent for the first of the three years bars him from pursuing for the penal rent for that year, though it does not affect his right for the two following years. — *Miller v. Lord Gwydir*, 2 W. & S. 52 (1826) ; *Aff.* 3 S. 65.

66. A penal rent of L.10 per acre being stipulated for land broken up before it had been three years in grass, and for two white crops taken in succession, it is exigible in respect of land so broken up, and also next year for a second white crop taken from the same. — *Lawson v. Ogilvy*, 7 W. & S. 397 ; *Aff.* 10 S. 531.

See 12, 72.

4. *Waygoing Crop and Straw.*

67. A tenant being bound by lease to remove at any Whitsunday on receiving a year's notice, and on being allowed one year's rent for defraying the expense of sowing with grass seeds the lands in tillage that year, and in consideration of leaving the whole lands in grass, he is not entitled, after such notice, to break up grass lands for the purpose

of taking a crop before he removes. — *Macmichan v. Hutcheson*, 4 P. 170 (1801); *Rev. 2 Bell, Leases*, 101, 102.

68. A clause in a lease providing that the tenant "should at no time sell or give away any of the hay or straw of said farm, which shall be always spent on the ground," prevents him from selling the straw or hay of the waygoing crop, although the custom of the country allowed it to be sold. — *Duke of Roxburghe v. Robertson*, 6 P. 614; 2 *Bligh*, 156 (1820); *Rev.*

69. A stipulation in a lease, "the whole fodder to be used on the ground, and none carried away at any time, hay only excepted," applies to the straw of the waygoing crop, though the hay was at Whitsunday, and there were no means for the tenant consuming the last crop and straw, and the custom of the country was that it should be sold. But the tenant is not liable in damages for failing to consume the fodder during the last year, though the landlord offers him facilities for feeding cattle. — *Gordon v. Robertson*, 2 W. & S. 115 (1826); *Rev. 3 S.* 656. *Gordon v. Anderson*, 3 W. & S. 1; 7 W. & S. 545 (1828 and 1834); *Aff. 4 S.* 13, and 11 S. 647.

70. Where a lease makes no stipulation respecting the manure, the tenant is entitled to the value, from the landlord, of that made in the last year subsequent to the period at which, by the custom of the country, it should be laid on the land for a waygoing crop. Where the lease provides that all the straw shall be consumed on the farm, the landlord is entitled, without payment, to any left unconsumed, but when the lease terminates at Whitsunday as regards houses and grass, and at the severance of the crop as regards arable land, the tenant is entitled to retain after Whitsunday as much straw as is requisite for the foddering of his cattle up to the severance of the crops. — *Allen v. Berry*, 3 W. & S. 417; 4 *Bligh, N.S.* 520 (1829); *Alt. 5 S.* 212.

71. A tenant being bound not to remove the hay and straw, except that of the last crop, and renouncing the lease before its expiration, is entitled to remove the fodder of the crop preceding his removal. Observations on the difference between "crop" and "year." — *Wemyss v. Drysdale*, 6 S. Bell, 455 (1849); *Aff. 10 D.* 467.

72. Under a lease providing only that not more than one-half should be in any year in white crop, and to farm according to good husbandry, and "to leave at the end of the lease the turnip or fallow breaks once ploughed for the incoming tenant," the entry being at Whitsunday, the tenant is bound to leave one-sixth of the farm once ploughed to the incoming tenant, but is entitled to take a black crop from the remaining part of the half which is not in white crop, though altering the rotation to obtain it. — *Hunter v. Miller*, 4 M'Q. 560 (1863); *Aff. 24 D.* 1011.

See 51, 52.

LAW, ADMINISTRATION OF.

1. Courts which administer both law and equity are bound, in a peculiar degree, to distinguish whether they give remedy under the one or the other branch, and in the latter to proceed by rules as clear, permanent, and precise as if they proceeded upon an Act of Parliament. — *Kerr v. Redhead*, 3 P. 309 (1794).

2. Observations on a manuscript report of a case produced for the first time at the last hearing of a cause; and on its authority, if in the handwriting of the Judge's clerk. — *Stewart v. Fullarton, and Bruce v. Bruce*, 4 W. & S. 209, 220, 246 (1830).

3. Observations by Lord Cranworth on the advantage of conciseness in law reporting, and of strictness in pleading. — *Dudgeon v. Thomson*, 1 M.Q. 714 (1854).

4. Observed by Lord Campbell that the costs in the case, L.277 on one side, were three times as much as they would have been either at common law or in equity in England. — *British Linen Co. v. Caledonian Ins. Co.*, 4 M.Q. 116 (1861).

See WRONGOUS IMPRISONMENT, 2.

LAW AGENT.

I. CHARACTER AND POWERS, . p. 218 | II. LIABILITY OF, p. 220

I. CHARACTER AND POWERS.

1. A judicial sale being made, and the law agent who conducted it being the purchaser, he was held not entitled to deductions on account of alleged deficiency in the rental, or in the title, of any part of the subjects, nor to his costs in an action for relieving the estate from an alleged burden, nor to interest on the price beyond the rental during the time he was kept out of possession by the dependence of such action. — *Menzies v. Menzies, Robert*. 139 (1715); *Aff.* 4 Br. Sup. 899.

2. A law agent having in his custody a decree in a furthcoming against his client, in which it was stated that a bond formerly granted by the client had been reduced by decree of certification, brought a new action of reduction of the bond, obtained decree, and afterwards brought an action for his expenses against his client. Held that he could not recover those incurred in the latter action, as it was unnecessary. — *Stewart v. M'Duff*, 4 P. 85 (1799); *Aff.*

3. A compromise of a doubtful claim, effected with equal knowledge of the facts on both sides, and without fraud, is binding, although one

of the parties is brother and legal adviser of the other. — *Hotchkiss v. Dickson*, 2 *Bligh*, 303 (1820); *Aff.*

4. A law agent, who was also in the position of trustee for his client, having recovered a sum for him, and asked him to name what he would allow for his trouble, without rendering any account, an allowance of a grossly excessive sum was reduced after the death of both parties. — *Taylor v. Long*, 2 *S. Ap.* 233 (1824); *Aff.* 1 *S.* 58.

5. An agreement that a law agent should retain ten per cent. of the sums received in an action held to be not proved. — *Taylor v. Richards*, 2 *S. Ap.* 251 (1824); *Aff.*

6. A law agent having obtained a decree for his client, and afterwards discovered facts which proved his client to have no right, but not disclosed them, and taken payment of the sum decreed for, and paid it over to his client's order, is not bound to repay the amount on the truth becoming known, the decree itself having been found irreducible. Question, How far in such a case the agent was bound to disclose the truth on learning it? — *Taylor v. Keith*, 2 *S. Ap.* 252 (1824); *Aff.* 1 *S.* 55.

7. In sustaining a petition and complaint against a law agent, the Court ought to specify the charges which they hold proved. — *Pearson v. Jack*, 1 *W. & S.* 577 (1824); *Alt.* 2 *S.* 651.

8. A mandate to a law agent signed by a mark (not admitted by the marksman), and by several other persons, coupled with the admission that the marksman had once attended the agent in the matter, is sufficient to warrant the law agent's account. — *M'Lean v. Murdoch*, 2 *W. & S.* 568 (1827); *Aff.* 3 *S.* 282.

9. An agreement of partnership or division of profits of business in the Supreme Court between a country agent and an agent in the Supreme Court, is invalid on two grounds,—1st, That it is between parties only one of whom is entitled so to practice; 2d, That it was intended to be kept secret. — *Gilfillan v. Henderson*, 6 *W. & S.* 489; 2 *Cl. & Fin.* 1 (1833); *Aff.* 10 *S.* 523. See *Writers to Signet*, 1.

10. It is not improper, but it is not in general a creditable course, that a law agent on his account being objected to, should add to it charges to which he is legally entitled, but which had not at first been inserted. But if the accounts are objected to merely because they are obscure, it is improper to remodel them except by way of classifying and simplifying them. (Per Lord Brougham.) — *M'Aulay v. Adam*, 1 *S. & M'L.* 665; 3 *Cl. & Fin.* 385 (1835).

11. A law agent having had his account prepared by another party, who included in it charges fabricated by himself, and the client having first obtained an order to have it taxed, and subsequently a remit to the auditor to inquire into and report as to these charges, which the

agent withdrew as soon as they came to his knowledge, and the auditor having thereon taxed them off without making a special report. Held, 1st, That the agent was free from blame, and in respect of the accusations made against his character, entitled to the costs of taxation subsequent to the withdrawal of the objectionable charges. 2d, That the auditor was not called on, in these circumstances, to make any report besides the taxation. 3d, That an objection that he had failed so to report must be made in writing. — *M'Aulay v. Adam*, 1 S. & M'L. 665; 3 Cl. & Fin. 385 (1835); *Aff.*

12. A law agent who prepared a feu-charter, having purchased the feu from the original disponee, is not barred from maintaining that certain conditions in the charter do not form real burdens, there not being distinct evidence that it was intended by the superior that they should be so constituted, and there being no fraud. — *Tailors of Aberdeen v. Coutts*, 2 S. & M'L. 609 (1837); *Aff.* 13 S. 226.

13. A law agent holding the title-deeds of several estates subject to his lien, retains, on the sale of one estate, and parting with the titles over it, his lien for the full amount, or balance undischarged, of his bill, over the other estates, though such balance is not proportionate to the value. His charge for adjudging on his debt is included in the lien as against his client, but not as against a prior heritable burden on the estate, and the approval of his bill by the client does not bar an heritable creditor from requiring it to be taxed. A law agent acting for both lender and borrower cannot set up his lien against the former, unless he communicated its existence before the transaction. — *Gray v. Graham*, 2 M'Q. 435 (1855); *Alt.* 13 D. 963. See *Ranking and Sale*, 10.

14. A law agent acting for two parties, and obtaining right by assignation to a security granted by one to the other, and prepared by himself, is bound by the terms of an agreement of which he had been cognisant as to the application of the funds realised. — *Gemmel v. M'Alister*, 4 M'Q. 449 (1863); *Aff.* 24 D. 956.

See ACTION, 24—BANKRUPTCY, 28—DEBT, 11—ENTAIL, 113, 162—FOREIGN, 25.

II. LIABILITY OF.

15. A law agent held liable, twenty-six years afterwards, for failure to intimate an assignation, the action being brought as soon as the representatives of the client learned the facts, although they had previously given the agent a general discharge. — *MacDonald v. MacDonald*, 1 Bligh, 315 (1819); *Aff.*

16. A heritable bond in security having been drawn with only an obligation for an *a me* holding, and an indefinite precept and sasine having been taken but not confirmed, by which the bond lost its pre-

ference, the law agent who drew the deed, though employed by the borrower, and not the lender, is liable to the lender for the loss. — *Lang v. Struthers*, 2 W. & S. 563 (1827); Aff. 4 S. 418. See Security, 7.

17. A law agent is not liable for error in a difficult and undecided point, if he conforms to the regular practice, but he is if the point arises through his unnecessary deviation from custom. — *Stevenson v. Rowand*, 4 W. & S. 177; 2 Dow & Clark, 104 (1830); Aff. 5 S. 903.

18. A law agent who had acted for both borrower and lender of a loan, and who had been told by the lender to take care that all was right, having taken only a heritable bond without any personal obligation from the borrower, is liable for the loss accruing in consequence of such neglect of usual form. — *Clark v. Sim*, 6 W. & S. 452 (1833); Aff. 10 S. 85.

19. A law agent is not liable for damages arising from his following the course of practice generally believed at the time to be correct, but subsequently decided to be incorrect; but is liable for repayment of the expense of preparing superfluous deeds. — *Graham v. Alison*, 6 W. & S. 518 (1833); Aff. 9 S. 130.

20. A law agent is liable in relief of damages incurred by his client in consequence of proceedings which were found illegal, having been based, by the agent's negligence, on a wrong section of the statute founded on. — *Hart v. Frame*, M'L. & R. 595; 6 Cl. & Fin. 193 (1839); Aff. 14 S. 914, 922.

21. A law agent, acting both for the borrower and lender on heritable security, is liable to the latter for failure to complete the security by intimation, and for concealment of the fact that there were prior burdens, though he was in the *bonâ fide* belief at the time that the security was ample, but costs of appeal not given against him. — *Donaldson v. Halclane*, 1 Robin. 226; 7 Cl. & Fin. 702 (1840); Aff. 14 S. 10.

22. An action against a law agent for neglect lies only where he has shown a want of reasonable skill, or been guilty of gross negligence or breach of duty, and the summons must expressly state these charges, or facts from which they can be directly and inevitably inferred. The arrest of an alleged debtor of the agent's client on a border warrant, which was held bad as not applying to one domiciled or holding property in Scotland, whereupon the arrestee recovered damages and costs from his opponent, are not facts from which such inevitable inference of negligence in the agent can be drawn as to dispense with express allegation. — *Purves v. Landell*, 4 S. Bell, 46; 12 Cl. & Fin. 91 (1845); Rev. 4 D. 1543.

23. A law agent, acting in a transaction in which A., B., and C. are interested, and preparing a deed by which A. is to be relieved by B. from liability to C., is not liable to A. for loss by imperfection of the

deed, unless employed by him or by his authority, and not merely by B. for A.'s benefit. — *Robertson v. Fleming*, 4 *M'Q.* 167 (1861); *Rev.* 21 *D.* 982. See *Contract*, 6.

See *FACTOR*, 2—*PERSONAL CAPACITY*, 9, 15—*REDUCTION*, 18—*SUPERIOR AND VASSAL*, 4—*TRUST*, 16, 21, 33, 38.

LAW OF SCOTLAND.

1. Observations by Lord Eldon, approving of the principle that the law of Scotland is not to be assimilated to the law of England, but that, if not hitherto determined, English rules may be resorted to. — *Ogilvie v. Dundas*, 2 *W. & S.* 214 (1826). *Earl of Stair v. Stair's Trs.*, 2 *W. & S.* 622.

2. The civil law is not of direct authority in the law of Scotland, and is of little weight in questions of mercantile law. (Per Lord Brougham.) — *Thomson v. Campbell's Trs.*, 5 *W. & S.* 25 (1831).

3. Where there is no peculiar principle of the law of Scotland applicable to a question, and especially when the question is raised by a statute common to both England and Scotland, there is great inconvenience and reproach to the law if different rules are laid down. (Per Lord Cottenham.) — *Duncan v. Findlater*, *M'L. & R.* 929; 6 *Cl. & Fin.* 894 (1839). See *Statute*.

4. When the English law settled in the Courts (though never affirmed on appeal) is founded on principles of universal application, not on any peculiarities of English jurisprudence, unless there has been in Scotland a settled course of decision to the contrary, a different rule from the English will not be sanctioned. (Per Lords Cranworth and Chelmsford.) — *Bartonhill Coal Co. v. M'Guire*, 3 *M'Q.* 285.

See *SALMON FISHING*, 4—*STATUTE*, 3, 13, 14, 20—*TRUST*, 33.

LEGITIM.

1. An obligation in a marriage-contract to pay certain sums to younger children, not declared to be in full of legitim, does not exclude their claim for legitim; but the legitim, if less than the provisions, will be imputed to it *pro tanto*, and the remainder only due out of the rest of the personal estate. — *Nisbet v. Nisbet, Robert.* 594 (1727); *Aff.*

2. On a wife's renunciation in a marriage-contract of her *jus relictæ*, the division of the personal estate is bipartite, into dead's part and legitim. — *Nisbet v. Nisbet, Robert.* 594 (1727); *Aff. M.* 8181.

3. Moveable bonds are subject to the claims of legitim. — *Nisbet v. Nisbet, Robert.* 594 (1727); *Aff. M.* 8181.

4. Renunciation of legitim is not to be implied from acceptance of a provision not expressly declared to be in lieu of it. On some of the children renouncing, the remaining children take as if they were the only children alive. Question as to division of goods in communion, the mother having died before the renunciation of some of the children. — *Hog v. Lashley*, 3 P. 247 (1792); *Aff. M.* 8193.

5. The children surviving the father are not excluded from legitim by a deathbed deed giving them a larger provision, which their tutors accepted, but which they did not survive to ratify when of age. — *Burden v. Smith*, Cr. & St. 215 (1738); *Rev. in part, Elchies v. Mutual Contract*, No. 7.

6. Legitim is not discharged by a gift to a son in business, for which he granted a receipt "as the portion bestowed on me;" but a discharge by the father of a loan to the son, declaring it to be in full of all he could ask by way of legitim, being found in the father's repositories, and after his death handed to the son, and accepted by his assignees in bankruptcy, the claim of legitim is excluded. — *Hog v. Thwaytes*, 4 P. 364 (1802); *Alt.*

7. Legitim cannot be disappointed by a transfer of personal property to a trustee to be invested in land after the father's death. A transfer of property, though *ex facie* absolute, will be held to be in trust only if the interest is afterwards drawn by the transferrer, and it will not be held, without express evidence, to have been made for the purpose of reserving a liferent, while the fee is given to the transferee. — *Lashley v. Hog*, 4 P. 581 (1804); *Rev. M. Legitim*, Ap. 2.

8. Sums advanced, or an annuity, to the child before the father's death, must be imputed in part of legitim, but not in part of a share of the goods in communion. — *Lashley v. Hog*, 4 P. 581 (1804); *Aff.*

9. The claim for legitim is not defeated by a voluntary alienation by the father, several years before his death, to his son, who was his partner in business, of all his property, including the business, and reserving only an annuity. — *Millie v. Millie*, 5 P. 160 (1807); *Aff. M.* 8215.

10. A claim for legitim is not discharged by failure to make it for twenty-one years, on the part of a sister living in family with her only brother, but the sum will be subject to deduction for her board. Interest, however, allowed on it where an annuity had been left to the claimant, of which she was never informed, and which was never paid. — *Kirkpatrick v. Sime*, 5 P. 525 (1811); *Aff. F.C.* 1st March 1804.

11. A settlement in the English form, on the marriage between an Englishman and the daughter of a Scotsman, in which the latter gives a sum to his daughter "as her portion or fortune," does not discharge

her claim for legitim. The proposals for the settlement, also in the English form, provided that the settlement should contain all usual and necessary clauses. Held that this did not imply that a discharge of legitim should be inserted. (In the Court of Chancery.) — *Marquis of Breadalbane v. Marquis of Chandos*, 2 S. & M'L. 377 and 402; 4 Cl. & Fin. 43 (1836); Aff. 14 S. 309.

12. Acceptance by a child, after the father's death, of a provision granted in his settlement declared to be in satisfaction of legitim, operates in favour of the general donee, and not to increase the legitim of the other children. (Per Lord Campbell)—The rule is the same in the city of London. — *Fisher v. Dixon*, 2 S. Bell, 63 (1843); Aff. 2 D. 1121.

13. The *curator bonis* of a lunatic held entitled where no injury was done by it to other interests, to decree of declarator that he was not bound to elect between legitim and the gifts of a will till his recovery, though taking an income under the will in the meantime. — *Turnbull v. Cowan*, 6 S. Bell, 222 (1848); Aff. 7 D. 872.

See HEIRS—HERITABLE AND MOVEABLE, 10—PROVISIONS TO CHILDREN
—SUCCESSION, 3.

LEGITIMACY.

1. In a reduction of a service, on the ground that the party was a supposititious child, a proof allowed to both parties of all facts and circumstances, and on the evidence the reasons of reduction repelled. — *Douglas v. Duke of Hamilton* (Douglas cause), 2 P. 143 (1769); Rev.

2. The presumption of legitimacy is not overcome by hearsay reports of bastardy after the lapse of 100 years, and although the title impeached was a precept of *clare* granted to the alleged bastard on occasion of purchasing the property from him. — *M'Callum v. Campbell*, 4 P. 32 (1798); Aff. M. 16135.

3. A description in a sasine as *filius carnalis* is not conclusive proof of bastardy, and a marriage between the divorced adulteress and paramour prior to the Act 1600, c. 20, does not bastardise the issue. — *Duke of Roxburgh v. Kerr*, 1 S. Ap. 157; 6 P. 820 (1822); Aff.

4. In a competition of services, one party having been let into possession by the trustees, and having been always recognised as the legitimate heir, and having held another estate for fifty years on the same title, sequestration of the estate will not be granted on allegation of his illegitimacy, before proof. — *Campbell v. Campbell*, 4 M'Q. 711 (1864); Aff. 1 Macph. 991. See Heirs, 54.

See HEIRS, 60—HUSBAND AND WIFE, 10, 21—LEGITIMATION, 4.

LEGITIMATION.

1. An illegitimate child being born in America, the reputed father being domiciled there, but a Scotsman by birth, is not, by the subsequent marriage of his parents in America, where the law of subsequent legitimation does not prevail, rendered capable of inheriting land in Scotland. (Per Lord Eldon)—This case will not be a precedent for any other which is not precisely the same in all its circumstances. — *Shedden v. Patrick*, 5 P. 194 (1808); Aff. M. Foreign, Ap. No. 6. *See also* 1 Macqueen, 632.

2. A peer both of Scotland and of Great Britain, born and chiefly residing in England, having by a domiciled Englishwoman an illegitimate son, cannot legitimatise him by subsequent marriage in England, even as regards the Scottish peerage. (Per Lord Redesdale)—There is since the Union no distinct peerage of England and Scotland; all are peers of the realm (though all are not Lords of Parliament), and the succession to all must be regulated by English law. (Per Lord Eldon)—The succession to Scottish peers, *i.e.*, peers domiciled in Scotland, must be regulated by Scottish law. — *Strathmore Peerage*, 6 P. 646 (1821).

3. The principle does not apply where the father, though a Scotsman by birth, and proprietor of estates in Scotland, was domiciled in England; the son was born there, and the parents subsequently married during a short visit to Scotland, *sine animo remanendi*. Observed that the locus of the marriage is immaterial. Observed also that the general principle appeared to be independent of domicile, and would allow legitimation only in the case where the child is born in a country where the rule holds. — *Rose v. Ross*, 4 W. & S. 289; 6 Bligh, N. S. 468 (1830); Rev. 5 S. 605. *But see* 5.

4. The maxim "*Pater est, &c.*," does not apply in the case of a child born before marriage, and it is legitimated only on proof that the husband was, in fact, its father. Declarations of the alleged parents are of little weight in such questions. The period of 301 days is within the limits which the law allows as of possible gestation. — *Innes v. Innes*, 2 S. & M'L. 417 (1837); Aff. 13 S. 1050.

5. Legitimation takes place (irrespective of the place of the marriage or of the birth) wherever the domicile of the father was and continued throughout to be Scottish, the domicile of the mother being immaterial. — *Countess of Dalhousie v. M'Douall*, 1 Robin. 475; 7 Cl. & Fin. 817 (1840); Aff. 16 S. 6. *Munro v. Munro*, 1 Robin. 492; 7 Cl. & Fin. 842 (1840); Aff. 16 S. 18. *See* Domicile, 9.

6. A child legitimated *per subsequens matrimonium* cannot inherit land in England, although for other purposes the comity of nations

may cause its legitimacy to be recognised. — *Doe & Birtwhistle v. Vardill* (*English*), 1 *Robin*. 627, *Ap.*; 2 *Cl. & Fin.* 571, and 7 *Cl. & Fin.* 895.

7. A child born abroad is an alien, unless his father at the time of his birth is a British subject; therefore, if illegitimate at birth, his legitimation *per subsequens matrimonium* does not draw back to his birth, so as to render him a British subject. — *Shedden v. Patrick*, 1 *M'Q.* 535 (1853); *Aff.* 14 *D.* 721.

LIBEL.

1. In an action for libel against an alleged proprietor of a newspaper, who denied his connection with it, the actual proprietor is bound to produce his books to the Commissioner, that extracts may be taken of such entries as may be material. — *Paul v. Cadell*, 4 *P.* 89 (1799); *Aff. M.* 12375.

2. An action for libel on account of a letter published in a newspaper may be directed against both the printer and one designated as proprietor, or editor, or conductor, manager, or superintendent, on his interest in either character being proved. — *Morthland v. Cadell*, 4 *P.* 385 (1802); *Aff.*

3. In an action for defamation only the specific allegations of defamation can be considered. Evidence that a landlord had expressed suspicions of the probity of his factor in conversation with private friends, such suspicions being proved to have been also entertained by the general public, will not support an action. — *Donaldson v. Lord Perth*, 4 *P.* 112 (1800); *Aff.*

4. In an action for damages against several persons as jointly and severally liable, the summons must state and the evidence prove that the words complained of were the words of all the defenders. Observations without decision upon the subjects of malice and want of probable cause, issues, and public documents above stated. — *Young v. Leven*, 1 *S. Ap.* 179 (1822); *Rev.*

5. A public officer cannot be compelled to produce the information furnished to him, whether by a subordinate officer or an independent party, in reference to the character of one of whose conduct he is officially entitled to take cognisance. — *Earl v. Vass*, 1 *S. Ap.* 229 (1822); *Rev. F. C.* 20th *Feb.* 1818.

6. Libellous expressions in a petition and complaint are actionable on allegation of malice, although in the answers to the petition the pursuer had also been guilty of intemperance of language. — *Taylor v. Swinton*, 2 *S. Ap.* 245 (1824); *Aff.* 1 *S.* 59.

7. A master being sued by a servant for discharging him, pleaded that the servant cohabited with a married woman, who kept a house of ill fame, and assisted her in illegal acts; held that these statements were relevant, and therefore not ground for an action of libel on the part of the woman, unless malice were proved. — *Erving v. Cullen*, 6 W. & S. 566 (1833); *Rev.* 10 S. 497.

8. The publication of the names of parties appearing in the registers of protested bills and of hornings, &c., is not libellous. Question, Whether the Court can interdict any publication on the ground of its being libellous? — *Fleming v. Newton*, 6 S. Bell, 175; 1 H. L. Ca. 363 (1848); *Rev.* 8 D. 677.

9. In a defence of *veritas convicii* against an action of slander, the specific acts on which it is founded must be set forth, and the names of the witnesses given, and an allegation of common report is irrelevant. — *Douglas v. Chalmers*, 3 P. 26 (1785); *Aff. M.* 13939.

10. A letter detailing alleged misconduct of deputy-lieutenants in causing troops to fire on a crowd without provocation, is a libel which may be sued for by one of the deputy-lieutenants. *Veritas convicii* allowed to be proved? — *Morthland v. Cadell*, 4 P. 385 (1802); *Aff.*

See COURT OF SESSION, 11—HUSBAND AND WIFE, 27, 28—
JUSTICES OF PEACE, 4.

LIEN.—See BANK, 2—LAW AGENT, 13—MASTER AND SERVANT, 6—
PRINCIPAL AND AGENT, 4—SALE, 19.

LIFERENTER AND FIAR.

1. A fiar has not right to cut growing timber while a liferent “of the lands, with parks, woods, &c.,” is in existence. — *Duchess-Dowager v. Duke of Hamilton, Robert*. 443 (1723); *Rev.*

2. A deed of tailzie having first given a liferent, and burdened it with “the duty of alimentering and educating the fiar and the other heirs of tailzie,” this constitutes a personal obligation only on the liferenter. — *Lord Lovat v. Mackenzie, Robert*. 449 (1723); *Rev.*

3. An obligation in a marriage-contract to infest the wife in certain lands, together with the patronages, and superiorities, and feu-duties belonging thereto, carries to the liferentrix a right to present on a vacancy occurring during the liferent in the benefices, and also a right to enter vassals; and the defence of *bonâ fide consumpti* is not available to the heir-at-law who had excluded the liferentrix from these rights. She must, however, keep down the interest on heritable bonds. — *Lady Forbes v. Lord Forbes*, 2 P. 36 and 84 (1760); *Rev.*

4. The proprietor of an estate who has granted a liferent locality out of it in favour of his wife's provision, in case of her survivance, and in which she is infeft, may grant agricultural leases to endure after his death. — *Stewart v. Countess of Moray*, 2 P. 317 (1773); Aff. M. 4392.

5. Bonds burdened with a liferent to the granter's wife, and assigned by him to her, with declaration that they were only to be liferented by her, and that the fee should go to her children, cannot be validly discharged by the liferentrix. — *Cuthbert v. Mackenzie*, 2 P. 377 (1775); Aff.

6. Bank stock being bequeathed to trustees to hold for one in liferent and another in fee, a bonus declared subsequently to the testator's death is not dividend to be taken by the liferenter, but part of the stock of which he is entitled only to the interest. — *Irving v. Houston*, 4 P. 521 (1803); Rev. M. 8282.

7. The fee of heritable and moveable property being left to A., and the liferent to B., under burden of payment of all the testator's debts, and with power to B. to sell the moveable estate as far as necessary for that purpose; held that B. is bound to apply his whole liferent interest to the payment of debts, though exceeding the amount of the moveable fund, but reserving his relief from the fiar, should the amount exceed the liferent interest in the heritage. — *Waddell v. Waddell*, 6 P. 374; 6 Dow, 279 (1818); Rev.

8. An heritable bond having been assigned to one in liferent and another in fee, and the liferenter having, on receiving payment from the assignor, granted an obligation, improbativ and unstamped, to subscribe a formal and valid discharge as soon as it could be prepared; held that he was entitled, on repaying the money, to absolvitor in an action calling on him to make up a formal title, in the person of the fiar, for the purpose of implementing the obligation. — *Miller v. Anderson*, 7 W. & S. 12 (1833); Aff. 9 S. 542.

9. The fiar of a superiority, uninfeft, having conveyed the liferent of the superiority to another, with power to enter vassals, the liferenter can validly exercise the power, it not being of the nature of a mandate, but an interest vested in the liferenter. — *Craig v. Cochrane*, 2 Robin. 446 (1841); Aff. 16 S. 1332.

See ALIMENT, 3.

LUNATIC.

It is competent to appoint a *curator bonis* to a party of weak mind on medical certificate only, without cognition, and a petition for recal of the appointment, and for cognition at the instance of the party himself and interdictors, under whose care he had previously placed

himself, may be remitted to the Sheriff of the county to investigate and report, and, on the petition being refused, the interdictors may be found liable in costs to the curator. — *Bryce v. Graham*, 2 W. & S. 481 ; 4 Bligh, N. S. 492 (1826), and 3 W. & S. 323 (1828) ; Rem. and Aff. 6 S. 425.

See ACTION, 3—COURT OF SESSION, 7—LEGITIM, 13—PERSONAL CAPACITY—POOR, 1—SUCCESSION, 2.

MASTER AND SERVANT.

1. An apprentice bound to serve a certain "concern, or the subsisting partners of the said concern who may carry on their business," remains bound though, on the retirement of one of the partners, the name of the firm is entirely changed. — *Young v. Brown*, 3 P. 42 (1785) ; Aff.

2. An action of damages for dismissal does not lie against the son of the employer, by whom the dismissal was effected, but who does not represent the employer. — *Macdonald v. Burt*, 3 P. 512 (1796) ; Rev.

3. A master may dismiss a gardener for absence without leave for four days, though one of them was the fast day in the parish, and he had in part been occupied in the master's business. — *Craufurd v. Reid*, 1 S. Ap. 124 (1822) ; Rev.

4. A man having been killed by a tree which was being felled falling across the high road, the operation having been apparent to all passers by, but no precautions having been taken, and the owner of the tree, and master of the servant who cut it down, having been absent and given no orders for the operation, he is not liable in damages for the accident. — *Linwood v. Hathorn*, 1 S. Ap. 20 ; 3 Bligh, 193 (1821) ; Aff. F. C. 14th May 1817.

5. A master is not liable for breach of an interdict against him committed by his servant, but in his absence and contrary to his general orders. — *Duke of Roxburgh v. Waldie*, 1 W. & S. 1 (1825) ; Aff. 1 S. 367.

6. A man employed to cut wood has no lien for wages upon the wood. — *Callum v. Ferrier*, 1 W. & S. 399 (1825) ; Aff. 2 S. 102.

7. A coal-pit owner is liable for damages for the death of one of his workmen, if caused by the roof of the pit being left in a dangerous state by the negligence of the owner or his manager. — *Paterson v. Wallace*, 1 M'Q. 748 (1854) ; Rev. 16 D. 243.

8. The owner of a coal-mine is liable for injury done to any of the workmen by defects in the shaft when returning from work, whether justified in returning at that moment or not. — *Brydon v. Stewart*, 2 M'Q. 30 (1855) ; Rev.

9. A master is not liable for injury done to his servant by a fellow-servant engaged in the same occupation, assuming that due care has been used in the selection of the servant, and that the servant injured has been properly set to work, and that proper machinery and tools have been supplied. — *Bartonshill Coal Co. v. Reid*, 3 M'Q. 266 (1858); *Rev.* 17 D. 1017. *Bartonshill Coal Co. v. M'Guire*, 3 M'Q. 300 (1858); *Rev.*

10. A master is liable in damages for an accident to his servant arising from the patent insufficiency of machinery, or of the mode of its being secured, and, in the event of the servant being killed, his mother, whom he was supporting, may sue, and such action transmits to her representatives. — *Weems v. Mathieson*, 4 M'Q. 215 (1861); *Aff.* See STATUTE, 30.

MEDITATIO FUGÆ.

1. Both the creditor applying for and the magistrate granting warrant are liable in damages when the procedure is informal in respect of the warrant not proceeding upon any oath of verity or evidence of debt, nor on petition setting forth that the debtor was about to leave the kingdom, while the creditor's name was not inserted in the warrant, and it ordained apprehension, not for examination, but for imprisonment. — *Laing v. Watson*, 3 P. 219 (1791); *Aff.* M. 8555.

2. Failure by a debtor to lodge balances over-due, with a statement that he was going to the east country, and a general impression in the public mind that he was about to go abroad, held sufficient to exonerate the creditor from damages for applying for a *meditatione fugæ* warrant. — *Donaldson v. Lord Perth*, 4 P. 112 (1800); *Aff.*

3. A *med. fug.* warrant, signed by a magistrate, is valid, though the deposition on which it proceeded, and the examination of the party, were not taken before him, but on commission granted by him to one of the town-clerks. — *Carrick v. Martin*, 1 S. Ap. 257 (1822); *Aff.* F. C. 14th Nov. 1818.

4. A married woman, whose husband is a convicted felon, may be arrested on a *med. fug.* warrant, on demand for restitution of stolen property. — *Crowder v. Watson*, 6 W. & S. 271 (1832); *Aff.* 10 S. 29.

5. There is no privilege against arrest for debt available to a party who has been brought from England to Scotland on a criminal charge, and acquitted on trial. — *Crowder v. Watson*, 6 W. & S. 271 (1832); *Aff.* 10 S. 29.

See LAW AGENT, 22.

MEMBER OF PARLIAMENT.

1. Privilege of Parliament is a good defence against a reduction of the election of provost of a burgh, on the ground of the imprisonment by an M.P. of some of the electors to prevent their voting, so far as regards the M.P. himself, but it does not protect those who voted with him in the election, though not accessory in the illegal act. — *Mill v. Reid, Robert*. 452 (1723); *Aff.*

2. The eldest son of a Scottish peer held ineligible as a member of Parliament. — *Lord Daer v. Stewart*, 3 P. 293; 8 Br. P. C. 1 (1793); *Aff. M.* 8692.

ELECTION OF.

3. The Statute 7 Geo. II. c. 16, inflicting a penalty on the Sheriff wilfully making a false return in the election of a member of Parliament, did not apply where, on there being doubt, he returned the election of both candidates; but a penalty on a clerk wilfully returning to the Sheriff a party not duly elected, held to apply to the clerk returning one of such candidates. — *Campbell v. Hume, Cr. & St.* 346 (1743); *Alt. Elch. Member of Parl. No.* 13.

4. Remit to take evidence as to the nature of a right of liferent superiority granted by an heir of entail for the purpose of creating a vote. Observed (per Lord Thurlow), that if an estate is granted by the owner in execution of such a design, to a friend, in confidence of its being reconveyed, he depends solely upon his honour, and has no legal power to compel reconveyance. — *Elphinstone v. Campbell*, 3 P. 77 (1787); *Rem. M.* 8764.

5. The fact that the statute appoints a particular oath to be put to a party claiming as freeholder, does not exclude the Court, on appeal from the decision of the freeholders, from ordering him to reply to interrogatories framed to discover the fictitious nature of the qualification. — *Forbes v. Macpherson*, 3 P. 169 (1790); *Rev. M.* 8769.

6. Held that under the Statute 16 Geo. II. c. 11, the objections to enrolment as a voter must be made within four months. — *Elliot v. Pringle*, 3 P. 237 (1792); *Aff.*

7. Held that the office of coroner of the county of Stirling included with lands in the valuation of a retour, was of no value, and therefore that the lands alone were of sufficient value. — *Davidson v. Fleming*, 4 P. 554 (1804); *Aff. M.* 8599.

8. Remit to take evidence as to an alleged fictitious claim to be enrolled. — *Fleming v. Drummond*, 5 P. 537 (1811); *Rem.*

9. A party objected to as holding a nominal and fictitious qualification, held entitled to require that interrogatories should be administered to him for the purpose of admitting his answer on oath. — *Stewart v. Crawford*, 1 *Bligh*, 163 (1819); *Rem. F. C.* 7th March 1818.

10. In electing a member of Parliament for a burgh, question, Whether non-residence disqualified a member of council from voting. — *Black v. Campbell*, 5 *Dow*, 23 (1817); *Rev.*

11. Freeholders. Powers of Court. — *Gibson v. Forbes*, 1 *S. Ap.* 27; 3 *Bligh*, 499; *Aff. F. C.* (1817).

12. Freeholders. Title of one to reduce the title of another. — *Gibson v. Forbes*, 1 *S. Ap.* 30. *Arbuthnot v. Gibson*, 1 *S. Ap.* 35 (1821); *Rem. F. C.* 19th May 1820.

13. When a retour of the old extent was the same or nearly so as that of the feu-duties, the presumption was that the jury had stated the former from the latter, and therefore the retour did not establish that the lands were a forty-shilling land of old extent. — *Douglas v. Colquhoun*, 1 *S. Ap.* 493 (1823); *Aff.* 1 *S.* 507.

See BURGH, 36.

MINES AND MINERALS.

1. A reservation of mines and minerals in a feu, with liberty to the superior to work them, does not include a freestone quarry. Observed that in a lease the reservation would be implied, but unless there was an express power reserved to work, the landlord could not enter for that purpose. — *Menzies v. Earl of Breadalbane*, 1 *S. Ap.* 225 (1822); *Aff. F. C.* 10th June 1818.

2. A conveyance of land to a railway, reserving minerals and right to work them, is subject to the implied warranty that the working shall not damage the railway, and this is not affected by the Act requiring notice to be given of the commencement of such working, with power of purchase. Observed that the same rule would apply to the conveyance of land for building, or of the upper story of a house. Security may be required against damage before the working is commenced. — *Caledonian Ry. Co. v. Sprot*, 2 *M'Q.* 449 (1856); *Rev.* 16 *D.* 955. *Caledonian Ry. Co. v. Lord Belhaven*, 3 *M'Q.* 56 (1857); *Rev.*

See also COAL—PROPERTY, 14.

MINOR.

I. CAPACITY AND PRIVILEGES, p. 233	III. FATHER AS ADMINISTRA-
II. TUTORS AND CURATORS, . 234	TOR, p. 235

I. CAPACITY AND PRIVILEGES.

1. The maxim, *Minor non tenetur placitare*, does not apply in case of a reduction of the minor's title on the ground of fraud and forgery by his father. The Court of Session will judge, if necessary, of the fraud by inspection. — *Craufurd v. Craufurd*, Robert. 28 (1712); Aff. M. 9085.

2. A tack granted by a minor, bearing to be with consent of curators, but not signed by them, and followed by possession for thirty years, and payment of rent to the minor's heir after his death, which was four months after he came of age, is not reducible on the ground of non-concurrence of curators. — *Hamilton v. Lady Cardross*, Robert. 37 (1712); Rev. M. 8952. See *Landlord and Tenant*, 31.

3. A discharge by a minor without curators of part of the tocher stipulated in the marriage-contract, the discharge being granted privately before the marriage took place, is reducible on the ground of minority and lesion. — *Morison v. Viscount Arbuthnot*, Cr. & St. 7; 8 Br. P. C. 247 (1728); Aff. M. 9487.

4. A bond granted by the tutor for a minor, for payment of aliment of the predecessor in the estate, is reducible on the head of minority and lesion only in so far as it liquidates the sum payable. — *Davidson v. Watson*, Cr. & St. 288 (1740); Rev. M. 11077; 5 Br. Sup. 200.

5. A minor is not liable for his father's debts as vitious intromitter, nor bound to restore what may have been disbursed for his maintenance and education by the trustees left by his father; but he is liable to repay to his father's creditors whatever he may have received from his trustees after attaining majority, and repayment to this extent may be ordered in an action brought against him as vitious intromitter. — *Bremner v. Campbell*, 2 S. & M'L. 895 (1837); and 1 S. Bell, 280 (1842); Alt. 1 D. 618.

6. Possession of a bill of exchange belonging to a minor, but not negotiable by his factor, who was accustomed and empowered to receive the interest on it, is not authority to pay the principal to the factor. — *Clyde Trs. v. Duncan*, 2 Stu. H. L. 57 (1853); Aff.

7. An infant British peer having estates in both England and Scotland, and born in Scotland, having been made a ward of Chancery, and subsequently a tutor having been retoured to him in Scotland, and being clandestinely removed to Scotland by one of the guardians appointed by the Court of Chancery; held that the Court of Session was

bound, on the application of the other guardian, to make an immediate order for delivering him up, and not justified in delaying consideration for four months, by which time the pupil would have become a minor. — *Stuart v. Stuart* (Marquis of Bute), 4 M'Q. 1 ; 9 H. L. Ca. 440 (1861) ; Rev. 22 D. 1504.

See DEBT, 2—ENTAIL, 8—HEIRS, 4—HERITABLE AND MOVEABLE, 1—PATRONAGE, 8—PRESCRIPTION, 2, 19, 23, 24.

II. TUTORS AND CURATORS.

8. A tutor nominate having signed a tutorial inventory, which was afterwards judicially produced by a procurator, is held to have accepted the tutory ; but if the appointment was made on deathbed, he cannot have the benefit of being liable only for intromissions under Act 1696, c. 8. But it being afterwards shown that the signing was not before witnesses, nor judicially under Act 1681, c. 5, the inventories are null and void, unless supported by acts of administration. A letter consenting to the other tutors lending the pupil's money, and oral proof of directions given about the pupil being put to school, and about repairs of buildings belonging to him, are not acts of administration. — *Watson v. Watson*, Robert. 134 (1715) ; Aff. M. 3244.

9. A factor cannot, by any right acquired in his own person during the factory, invert the heir's possession, and therefore cannot adjudge while factor. In accounting he must, under the A. S., 31st July 1690 and 22d Nov. 1711, account according to the rental, whether received or not, but charging the aliments paid in each year against the rents received in that year, and not against the interest on the rents. No factor's fee will be allowed where he sets up an adverse title to the estate. — *Maxwell v. Sharp*, Robert. 380 (1721) ; Aff.

10. The curators of a minor may validly convert personal into heritable securities, if he previously empower them or subsequently approve, and his approval may be proved by parole evidence. — *Wauchope v. Wauchope*, 1 Cr. & St. 200 (1737) ; Aff. *Elchies v. Minor*, No. 6.

11. A former curator of a party now of age, but who was of known weak intellect, and soon after interdicted, is liable as *negotiorum gestor* for any charge he may continue to take of the late minor's affairs, even though he himself is present, and apparently consenting to the transaction. — *Graham v. Ker*, 2 P. 13 (1758) ; Aff. M. 3529.

12. A tutor neglecting to include in his inventory certain dues payable to the pupil, is liable for interest upon them from the time they were received, and cannot charge commission. A curator, after expiry of the office, but before discharge, may, where there is no fraud, obtain

the renewal to himself alone of a lease which was granted jointly to himself and the minor's father. — *Parkhill v. Chalmers*, 2 P. 291 (1773); Aff. M. 16365.

13. Tutors failing to make up inventories are liable conjunctly and severally, though appointed by a will declaring that each should be liable for his own acts only, and one of them is liable in damages for loss occasioned to the pupil by a decree of removing obtained by him irregularly as factor for the landlord. L.200 costs given against appellant as a punishment. — *Duff v. Henderson*, 3 P. 283 (1793); Aff. M. 16375.

14. Tutors having lent money on an heritable bond, and after expiry of their tutory discharged the bond, the discharge is inept, and the debt subsists as a charge on the estate burdened, although they were also, in point of fact, trustees with others, but acted only in their character of tutors. A purchaser of the estate over which the bond subsisted, which is thus revived, is entitled to relief from the tutors to whom the amount was paid. — *Ross v. Lockhart*, 3 W. & S. 481 (1829); Aff. 5 S. 136. See 6.

15. When the office of tutor-dative is given to more than one person, though not expressed to be joint, and when there is no clause of survivorship, and no quorum or *sine quo non* constituted, the death of one terminates the office as to all the tutors. Question, Whether, if it had not been so terminated, a cautioner for one of the tutors who had been appointed factor by the other, would have been liberated by the death of one of those who made the appointment? — *Scot v. Stewart*, 7 W. & S. 211 (1834); Rev. 10 S. 392.

See CAUTIONER, 13, 14, 15—HUSBAND AND WIFE, 26.

III. FATHER AS ADMINISTRATOR.

16. A sum of money being settled by bond on a pupil for the purchase of lands to be entailed, and his father being appointed his tutor and curator as regards the sum, with power to call for the money when he should think fit, and employ it on security or the purchase of lands, with a salary for management, the father is not entitled to call up the money until lands are purchased, but it will be ordered to be consigned in Court till a purchase is approved by the Court. — *Lord Saltoun v. Fraser, Robert*. 312 (1720); Rev.

17. A father, as administrator, having contracted for the sale of reversionary interests of his minor children, he may bring action to enforce the contract. — *Stewart v. Gardners*, 2 P. 549 (1780); Aff.

18. Trustees are bound to pay to the father, as administrator for a pupil son, a sum due to the son under the trust, even though the father

is in poor circumstances, but if in embarrassed circumstances, they ought to require caution, and are not liable if the cautioners, being reputed sufficient at the time, afterwards fail. — *Dumbreck v. Stevenson*, 4 M'Q. 86 (1861); Aff. 19 D. 463.

See DEBT, 9—PARTNERSHIP, 66.

MULTIPLEPOINDING.

1. A multiplepoinding is a suitable procedure for ascertaining which of two parties has right to delivery of a deed in a third person's hands. — *Maule v. Ramsay*, 4 W. & S. 58 (1830); Aff. 6 S. 343.

2. Interest on interest is due by the common debtor from the date of citation in a multiplepoinding, unless he consigns. — *Napier v. Gordon*, 5 W. & S. 745 (1831); Aff. 8 S. 357.

3. The Court in its discretion may refuse to admit a new claimant in a multiplepoinding after decree of preference, except upon terms of paying costs, and its discretion in fixing the proportion to be paid will not readily be interfered with. — *Geikie v. Morris*, 3 M'Q. 347 (1858); Aff.

4. In an action of exoneration and multiplepoinding by trustees, it is competent for the Inner-House, on reclaiming note by the trustees, to open up the record and allow an amended claim, recalling to that effect an interlocutor which had not been reclaimed against, finding one of the parties entitled. — *Ralston v. Hamilton*, 4 M'Q. 397 (1862); Aff. 23 D. 1290.

See BANKRUPTCY, 12—CONVEYANCING, 10—PARTNERSHIP, 44.

NOTICE.—See ARRESTMENT, 4—ASSIGNATION, INTIMATION OF—BANK, 5, 7—BANKRUPTCY, 7, 9—EXECUTOR, 5—LANDLORD AND TENANT, 17—LAW AGENT, 1, 14.

NUISANCE.

1. Interim interdict granted against whale-oil boiling being commenced within burgh. — *Farnie v. Trotter*, 5 W. & S. 649 (1831); Aff. 9 S. 144.

2. In an action against the owner, tenant, and sub-tenant of a dye-work, for nuisances through the operations of the sub-tenant, an issue was taken against the sub-tenant, and another against the landlord and tenant, and a new trial being ordered on account of misdirection as to

the first issue; held that the second also should be sent again to trial, and that the landlord was liable if the operations authorised in the lease would, in the ordinary course of business, create a nuisance, though by possibility it might have been avoided. — *Hamilton v. Dunn*, 3 S. & M'L. 356 (1838); Aff. 15 S. 853.

3. Interdict continued against slaughtering cattle in buildings in course of erection for that purpose, with (of consent) liberty to apply for an opportunity to try the experiment whether it could be conducted without nuisance. — *Pedie v. Swinton*, M'L. & R. 1018 (1839); Aff. 15 S. 775.

4. In a suspension and interdict on account of an alleged nuisance, the petitioner having consented, after experiments made, and a judicial report that no nuisance was created, to a recal of the interim interdict, without any terms being imposed as to proceeding to trial, he cannot afterwards in the same suit insist on an issue being sent to a jury as to the fact of nuisance. — *Arnot v. Brown*, 1 M'Q. 229; 1 Stu. 694 (1852); Aff.

See EVIDENCE, 20.

OUTLAW.

A party, after the alleged commission of a murder, executed an *ex facie* absolute disposition of his heritage, in reference to which a backbond declaring it to be in trust for him, his heirs and assignees, was granted. He was subsequently cited edictally to appear before the Court of Justiciary, and on failure, was outlawed. He afterwards directed the trustees to execute a strict entail of his property. Held that the entail was effectual, and not reducible by the heir-at-law. — *Macrae v. Macrae*, M'L. & R. 645 (1839); Aff. 15 S. 54 and 1312. See Entail, 10—Trust, 39.

See FOREIGN, 23.

PAPIST.

1. The estate of which an attainted Papist was in possession through a trustee at the date of his attainder, held to be forfeited, it not having been claimed by the Protestant heir, under the Act 1700, c. 3, till subsequently to the attainder. — *Comrs. of Forf. Estates v. Mackenzie*, Robert. 263 (1720); Rev. And the estates of the Papist's attainted vassals, which would, under the Acts of Parliament, have escheated to

their superior, if he had remained loyal, in like manner passed on his attainder to the Crown, and not to the Protestant and loyal heir. — S. C., Robert. 280 (1720); Rev.

2. A child of two years old, though the son of Popish parents, could not be presumed a Papist under the Act 1700, c. 3. — *Comrs. of Forf. Estates v. Drummond, Robert.* 290 (1720); *Aff.*

3. A question on the statutes respecting the succession of Papists, 1695, c. 26, and 1700, c. 3. — *Neilson v. Murray, Robert.* 547 (1726); *Aff. M.* 9593.

4. Disqualification of Papist heir. — *Neilson v. Murray, Cr. & St.* 65 (1732); *Aff.*

PARISH.

I. DISJUNCTION AND EREC-	III. CHURCHYARD, . . .	p. 239
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I. DISJUNCTION AND ERECTION.

1. In a suit for this purpose before the Teind Court, the whole heritors must be called, and if a perambulation is ordered, it must be done fully over the whole parish. — *Viscount Kilsyth v. Presby. of Stirling, Robert.* 65 (1713); Rev. 1697. *See* ACTION, 10.

2. On disjunction of a parish, the whole amount of the original stipend may be modified to the minister of the original parish, and localled on the lands thereof, though above the legal minimum, and not in use to be paid. — *Lord Blantyre v. Currie, Robert.* 88 (1714); *Aff.* 1708.

See ACTION, 10—PARTNERSHIP, 29—PATRONAGE, 9.

II. MAINTENANCE OF CHURCH.

3. A part of the cathedral of Elgin was used as a parish church; another part, repaired and fitted up by the magistrates for divine worship, is not the parish church, and may be granted by them for Episcopal service. — *Innes v. Ministers of Elgin, Robert.* 69 (1713); Rev. Macl. Crim. 582.

4. Where in a parish, partly burghal and partly landward, there is no custom to regulate the proportion in which the heritors are to contribute to the rebuilding of the church, the charge is to be borne by all owners of land and houses in proportion to their real rents. — *Harlow v. Merchant Maiden Hospital (Peterhead), 4 P.* 356 (1802); *Alt. Maxwell v. Gordon (Anwoth), 6 P.* 184; 4 Dow, 279 (1816); *Aff.*

5. After a Presbytery has found the erection of a new church necessary, and called on the heritors to proceed therein, without effect, it

may order the erection, and decern against the heritors for the cost. — *Maxwell v. Gordon* (Anwoth), 6 P. 184; 4 Dow, 279 (1816); Aff.

6. The Court of Session, having appointed a committee of the heritors to enter into a contract for rebuilding the parish church, in accordance with a prior decree, with power to them to assess the heritors in the sums contained in the contract, and, in general, to take all necessary steps for executing the work, and the work having exceeded the contract price, and other expenses and interest having been incurred, for which the committee of heritors granted their personal bills, they are entitled to relief by the other heritors, and, after the rating powers of the committee of heritors were exhausted, the whole heritors had power to make a rate for payment of the balance due. — *Forbes v. Shaw* (Falkirk), 4 W. & S. 300 (1830); Aff. 5 S. 761.

7. The heritors are not bound to provide additional church accommodation in consequence of the increase of population, the existing church being in proper repair. — *Miller v. Earl of Glasgow* (Neilston), 7 W. & S. 185 (1834); Aff. 9 S. 370.

8. On the repair and reseating of a parish church no change ought to be made in the allocation of seats, and therefore the magistrates of a burgh who had occupied, on an informal and doubtful title, one of the galleries, held entitled to the same after its restoration. — *Duke of Hamilton v. Mags. of Hamilton*, 7 S. Bell, 1 (1850); Aff. 8 D. 844.

See SUPERIOR AND VASSAL, 19.

III. CHURCH-YARD.

9. A church-yard having been disused, and included within the pleasure-grounds of one of the heritors, he is bound to fence it and to allow access, on due notice, to all relatives of persons buried. — *Earl of Mansfield v. Wright*, 2 S. Ap. 104 (1824); Aff.

10. Possession for more than forty years without infestment, on a disposition *a non domino*, of a burying-ground, does not give any prescriptive right. — *Ouchterlony v. Off. of State*, 1 W. & S. 533 (1825); Aff. 2 S. 437.

See ACTION, 10.

IV. MINISTER'S STIPEND.

11. The Court of Teinds has no power to grant an augmentation of ministers' stipends out of any other fund (though appropriated to the purpose) than the teinds of the parish. — *Wishart v. Mags. of Edinburgh*, 2 P. 118 (1766); Rev. M. 7476.

12. The minister of North Leith has no right to teind on fish brought into Leith or Newhaven only for re-exportation, but, in respect of usage,

he has a right to teind on fish that have already paid teind where they were caught. — *Johnstone v. Chalmers*, 2 P. 559 (1781); Aff.

13. Appeal lies against the decree of the Court, as Commissioners of Teinds, refusing an augmentation. It is not a valid defence in law against a claim for augmentation that one augmentation has already been granted since the previous. — *Milligan v. Wedderburn* (Kirkden), 2 P. 621 (1784); Rev.

14. One augmentation does not exclude a subsequent claim for augmentation, and remit to consider whether possession of the *ipsa corpora* of the teinds by the minister, for fifty or sixty years, does not found a prescriptive right to the whole. — *Mitchell v. Off. of State* (Tingwall), 3 P. 140 (1789); Rev.

15. Funds being invested in land, and mortified for the use and behoof of the minister, for making up his stipend to 800 merks, he is entitled to the full rents though exceeding that sum, and a final decree in an action respecting the management of the funds before they exceeded that amount, finding that they were to be applied in the first place to the stipend, and in the second place to some minor purposes, does not exclude the minister from claiming the surplus after these purposes are satisfied. — *Rennie v. Tod* (Borrowstounness), 5 P. 144 (1806); Rev.

16. The Court of Session, as Commissioners of Teinds, had power, even prior to 48 Geo. III. c. 138, to make further augmentations, though one had already been made subsequent to 1707. — *Earl of Wemyss v. Macqueen* (Prestonkirk), 5 P. 210 (1808); Aff. *M. Stipend*, Ap. No. 6. *Duke of Hamilton v. Scott*, 5 P. 224 (1805); Aff.

17. During the vacancy of a parish, though by the wrongful act of the Presbytery, the stipend belongs to the Widows' Fund, under 54 Geo. III. c. 169. — *Gordon v. Earl of Kinnoull*, 4 S. Bell, 126 (1845); Rev. 5 D. 12.

See BANKRUPTCY, 21—BURGH, 17—SUPERIOR AND VASSAL, 19, 23—
TEINDS.

V. MANSE AND GLEBE.

18. On a common being divided among the heritors, one of them undertook that the minister of the parish should have right of grazing on his share. Held that this does not prevent the minister from claiming designation of a grass glebe, and that on such claim it should be designed out of the lands of the heritor who had so undertaken, though his lands were now all arable, and there were kirk lands in grass in the parish. — *Wilkie v. Simpson* (Foulden), 2 P. 222 (1770); Aff.

19. A new manse may be ordered to be built on a report by a builder that it would be the best course for all parties, though it is

only thirty years old ; and the expense of building need not be restricted to L.1000 Scots under the Act 1663. — *Mercer v. Williamson* (Lethindy), 3 P. 43 (1785) ; Aff.

20. The minister of a royal burgh, having a landward district annexed, is entitled to have a manse and glebe assigned him, and his claim is not barred by acceptance by a predecessor of a sum in lieu of manse. — *Earl of Elgin v. M'Lean* (Dunfermline), 5 P. 593 (1812) ; Aff. M. Manse, Ap. No. 1.

21. The minister of a royal burgh, having a landward district annexed, is entitled to a manse. Specialties in the question whether Ayr is wholly burghal or partly landward. — *Auld v. Mags. of Ayr*, 2 W. & S. 600 (1827) ; Rev. 4 S. 99.

22. A declaration by the Presbytery, after repair of a manse, that it is sufficient, does not make it a free manse, and a declaration of free manse does not exempt the heritors from repairs rendered necessary by lapse of time. — *Duke of Hamilton v. Scott* (Avondale), 5 P. 745 ; 1 Dow, 393 (1813) ; Aff.

23. When a manse has been built, but become ruinous, the rebuilding falls under the second branch of the Act 1663, c. 21, in which the expense is not limited to L.1000 Scots, and L.1200 sterling is not too large a sum to be decerned for. — *Dingwall v. Gardiner* (Aberdour), 1 S. Ap. 10 ; 3 Bligh, 72 (1811) ; Aff. F. C. 27th Nov. 1816.

24. When lands were held in common by an abbey and a layman, and a singular successor acquired right to both without distinction, and the Presbytery had set out a grass glebe, on the footing that the whole was kirk-lands, their decree was suspended. — *Forbes v. Wilson* (Falkirk), 1 S. Ap. 249 (1822) ; Rev. F. C., 10th June 1818.

25. A minister found entitled to the grass glebe designed by the Presbytery, lying within the old park of a castle now in ruins, in preference to another offered by the heritor, which was surrounded by a common, and also found entitled to pecuniary compensation for want of a glebe pending the litigation. — *Moore v. Belches* (Oldhamstocks), 2 W. & S. 558 ; 1 Dow & Clark, 55 (1827) ; Rev. 4 S. 347.

26. The ministers of the Church of Scotland are liable to assessed taxes, and to property-tax and rates under local acts, on their manses, glebes, and stipends. — *M'Lea v. Walker*, 1 Bligh, 535 (1819) ; Aff. *But see* Poor-rates, 7.

See ACQUIESCENCE, 4—SUPERIOR AND VASSAL, 19.

PARTNERSHIP.

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THIRD PARTIES, . . .		246

I. RIGHTS OF PARTNERS *inter se*.

1. A partner having made a claim against the Crown, which was allowed in his accounts, but afterwards having stated that the claim was not really good, and waived it, is still liable to his co-partners for the share due them of the sum allowed. — *Brand v. Kennedy, Robert*. 8 (1710); *Aff*.

2. Two parties having entered into joint contract to execute work, and having afterwards agreed between themselves that each should execute half, and receive half the consideration, and one having drawn more than his share, he is liable to pay the proper proportion to his joint-contractor, with interest from the date of its receipt, and costs of an action for obtaining the division. — *Habkin v. Hog, Robert*. 147 (1715); *Rev*.

3. A contract of partnership provided that the representatives of one deceasing should be entitled to the value of his share as at the last annual balancing; held that this did not apply where the firm had become bankrupt subsequently, and before the partner's death. — *Blair v. Douglas*, 6 P. 796 (1777); *Aff. M.* 14577. *See* 6.

4. A partner in a company held bound to contribute his proportion of a call made for the payment of its debts, though exceeding the nominal amount of his shares. — *Gray v. Douglas*, 6 P. 800 (1779); *Aff*.

5. A partner in two companies, one of which, A., was indebted to the other, B., having received from his copartners in A. funds and securities for the purpose of, and acknowledged by him to be sufficient for, the payment of its debts to B., is not entitled, on the dissolution of B., to claim his share of its assets, as if such debt were paid. — *Whytlaw v. Coats*, 4 P. 148 (1800); *Aff*.

6. By deed of partnership a balance was to be struck annually (which by custom was done in May), and on a partner dying he was to be entitled to a share of profits according to the last struck balance. Held that on the death of a partner in July his representatives were entitled to a share in the profits up to the May preceding, though, by the default of another partner, no balance had in fact been struck since the May of the year before. — *Forster v. Paterson*, 4 P. 295 (1802); *Aff*.

7. Remit to take evidence of facts as to division of assets. — *Bruce v. Ogilvie*, 5 P. 706 ; 1 Dow, 38 ; Rem.

8. A contract of partnership for 124 years, for the mutual employment of coal-pits and salt works belonging to the two partners, with leases of each, is not void on account of the length of the time, and the heirs are bound by it. Circumstances in which the allegation of fraud, and of the business being a losing concern, as grounds for its dissolution, were repelled. — *Warner v. Cunningham*, 3 Dow, 76 (1815) ; *Aff.*

9. A manager of a company receiving, in addition to his salary, a share of profits without advancing any capital, and being liable to dismissal, is not, as between the partners of the company, to be held as a partner. — *Geddes v. Wallace*, 6 P. 643 ; 2 Bligh, 270 (1820) ; *Rev. See Written Document*, 4.

10. In an action by a partner for a share of profits under the contract of copartnery, all the existing partners, and the representatives of deceased partners whose interest has not yet terminated, must be called as defenders, whether they are solvent or bankrupt. — *Bell v. Willison*, 1 S. Ap. 220 (1822) ; *Alt.*

11. Three partners in a speculation having sold partnership property to one of their number, who resold at a profit, one of them was held barred, in the special circumstances, and by acquiescence, from claiming a share in the profit on the ground of fraudulent concealment ; but costs not given. — *Bayne v. Kyd*, 5 Dow, 151 (1817) ; *Aff.*

12. A partner having without authority used the name of the partnership in a joint adventure, it is entitled to the profits arising therefrom, and may use arrestment on debts due to the joint adventure. — *Wallace v. Campbell*, 2 S. Ap. 467 (1824) ; *Aff.* 1 S. 53 and 509.

13. One of the partners in a joint adventure having in the written contract undertaken to proceed to India to conduct it, he is not entitled to further remuneration for work done there in winding up the adventure, on circumstances having rendered it unprofitable, or for damages on account of loss of profit on his own capital on the concern being wound up. — *Campbell v. Beath*, 2 W. & S. 25 (1826) ; *Rev.* 3 S. 353.

14. A partner having disclaimed a certain adventure, and desired that, if conducted at all, it might be solely in the name of his copartner, he is not liable for loss nor entitled to profit upon it. — *Buchanan v. Morris*, 2 W. & S. 143 (1826) ; *Aff.* 4 S. 37.

15. The shares of partners being originally equal, proposals made by one of them for an alteration in the relative proportion, but not definitely assented to, do not alter the original contract. — *Struthers v. Barr*, 2 W. & S. 153 (1826) ; *Rev.* 4 S. 118.

16. A firm having kept no books, private books of one of the parties, in which were entries relating to the firm, are not evidence in his

favour, there being no proof of their having been seen by the other partner. — *Smith v. Mitchell*, 4 W. & S. 47 (1830); *Aff.* 5 S. 32.

17. When there is no written contract of partnership there is no presumption of law that there is an equality in the respective shares; the question is one for a jury, and the equality will only be assumed in the total absence of circumstances to lead a jury to infer a different proposition. The question whether the entering into partnership is a waiver of all previous claims between the parties is also proper for a jury. — *Thomson v. Campbell's Trs.* 5 W. & S. 16; 7 *Bligh, N. S.* 432 (1831); *Rev.* 7 S. 650.

18. A contract of copartnery of a joint-stock company provided that "ordinary business" might be transacted by a quorum of five of the fifteen directors, but that other business should require a majority of the directors. Held that the calling up of the full amount of the shares was not ordinary business, and required a majority. — *Clyne v. Selater*, 5 W. & S. 625 (1831); 9 S. 248.

19. Questions respecting interpretation of, and management under, a deed of partnership for the purchase of an estate, it being purchased in name of one partner, who burdened and refused to sell it, and an arbitration clause being called into operation. Question also as to usury from payment of compound interest. — *Hunter v. Cochrane*, 5 W. & S. 639 (1831); *Aff.* 9 S. 477.

20. Opinion that a partner in a company may be sequestrated at the instance of other partners on a debt due to the partnership. — *Scott v. Kerr*, 6 W. & S. 214 (1832).

21. The deed of a joint-stock shipping company stipulated that the free profits should every year be divided, after deduction of 25 per cent. for a sinking fund till the fund should reach a fixed sum. Held that before computing the net profits it was a proper course to make a deduction for deterioration, and that the profits on an insurance account were subject to the 25 per cent. deduction. — *Flowerdew v. Dundee, &c. Shipping Co.* 6 W. & S. 160 (1832); *Aff.* 9 S. 373.

22. A partner of a company, sued by it as a contributory, is not entitled to an action of relief against other partners in respect of their liability to the company anterior to the date of the state of accounts on which the company's action is brought. — *Martin v. Hunter*, 7 W. & S. 574 (1835); *Aff.*

23. When the act of incorporation provides that "no calls shall be made but at the distance of one calendar month at least from each other," it is incompetent to make at the same time two calls payable at a month's interval, and in such case the first only is good. — *Baillie (Clyne's Trs.) v. Edin. Oil Gas Co.*, 2 S. & M'L. 243; 3 *Cl. & Fin.* 639 (1835); *Rev.* 10 S. 723.

24. A resolution of a company incorporated by act to dissolve itself and become merged in another company, is not binding upon shareholders not actually consenting, and they are entitled to recover the market value of their shares from the company. — *Baillie (Clyne's Trs.) v. Edin. Oil Gas Co.* 2 S. & M'L. 243; 3 Cl. & Fin. 639 (1835); Aff. 10 S. 723.

25. Under the terms of a partnership contract the directors held entitled to relief from the partners of their debts incurred in the management, though to an extent beyond the amount of their shares, and though they had begun business before the whole shares were taken up. — *Alexander v. Macalister*, M'L. & R. 353 (1839); Aff. 15 S. 1061.

26. A director, in whose name as trustee for a company the property of it has been vested, is bound after his retirement to concur when required in a conveyance, but he is entitled to have the fact that he is no longer a director stated in the conveyance. — *Stewart v. Gloag*, M'L. & R. 721 (1839); Aff. 16 S. 86.

27. Where a prosecution of two partners, in respect of an illegality, is compromised, one of the guilty parties has right to contribution from the others. — *Campbell v. Campbell*, 1 Robin. 1; 7 Cl. & Fin. 166 (1840); Aff.

28. A shareholder in a company is liable for calls though he has not subscribed the books, which by the partnership deed is necessary before he can claim the rights of a partner. — *Burnes v. Pennell*, 6 S. Bell, 541; 2 H. L. Ca. 497 (1849); Aff. 10 D. 689.

29. A subscription having been got up for the purpose of building new churches and attaching districts to them, and an association formed for the purpose, but it being afterwards found that the church courts could not attach the districts as parishes *quoad sacra*, it is not competent to part of the subscribers to demand restitution of the money, and sale of the churches, as the main object could still be effected, though by other means than at first contemplated. — *Bain v. Black*, 6 S. Bell, 317 (1849); Aff.

30. When it is impossible or very difficult, from the nature of the company, to get the shareholders to examine its affairs (as in the case of a bank which has made advances to its shareholders), the Court will entertain an application by a single shareholder to have its affairs examined on averments of improper acts by the directors, with a view to its dissolution if its affairs are in a position which, under the deed, would warrant that course. — *North British Bank v. Collins*, 1 M'Q. 369; 2 Stu. H. L. 26 (1852); Aff. 13 D. 349. See 8, 51.

31. A committee formed, and receiving subscriptions, to effect a certain object, *e.g.*, to procure a railway act, is entitled to use the subscriptions for the purpose to the full extent originally intended, though

some of the subscribers afterwards object, and is not liable for a sum which might, by a different course of conduct, have been realised. — *Baird v. Ross*, 2 M'Q. 61 (1855); *Rev.*

32. A shareholder cannot sue for reduction of a call properly made, on the ground of misapplication of the funds so raised, nor for a count and reckoning, until at least he has exhausted all regular means of getting the company to correct its accounts. Inaccurate accounts are not properly objected to as a matter *ultra vires* of the company. — *Orr v. Glasgow, Airdrie, &c. Ry. Co.* 799 (1860); *Aff.* 20 D. 327.

See 49–52, 54–59—DEBT, 1—LAW AGENT, 9—PUBLIC WORKS, 13, 15.

II. PROPERTY OF FIRM.

33. Remit to consider whether heritable estate of a partner, used for the purposes of the partnership, becomes personal as to succession. Opinion of Lord Eldon that it should. — *Kirkpatrick v. Sime*, 5 P. 525 (1811); *Rev.* 1st March 1847. This case was compromised, F. C. 1812–14, p. 684.

34. Next of kin of a partner held entitled to produce evidence of a property in Jamaica having been partnership property, although the executors had fifteen years before settled accounts with the partnership on the footing that it was not. — *Lister v. Sutor*, 6 P. 78 (1815); *Aff.*

35. A portrait painted at the instance of an association as a testimonial to an individual, and which was intended to be placed in a public building, but which the managers of the building declared should remain the property of the association, remains its property on the removal of the building to another site, and it is not subject to any obligation to allow it to be transferred. The son of the party has no right to interfere in the disposal of the portrait. — Observations on the copyright of letters. — *Clerk v. Adam*, 6 W. & S. 141; 1 Cl. & Fin. 242 (1832); *Alt.* 9 S. 708.

36. Estates purchased in the name of one partner of a company, and in respect of which he exercises all the usual rights of ownership, are not to be considered as in trust for the company, because of entries in the books entitled with the name of the estates, the purchase-money having been advanced by the company, but a later declaration being made that they were the partner's private speculation. — *Royal Bank v. Christie, Robin.* 118; 8 Cl. & Fin. 214 (1841); *Aff.* F. C. 17th May 1839.

See ACTION, 4, 5, 6—BANKRUPTCY, 23, 47—INSURANCE, 3.

III. LIABILITIES OF FIRM TO THIRD PARTIES.

37. Bonds issued by a company to themselves, in name of their

secretary, cannot compete with prior creditors. — *Billers v. Duke of Norfolk, Cr. & St.* 255 (1739); *Aff.*

38. Remit to consider whether a contract entered into by an incorporated company was still binding after the lapse of more than forty years, the prescription being alleged to have been interrupted by an action and horning directed, not against the incorporate firm under which by their act the company is to sue or be sued, nor against the directors who subscribed the contract, but against the governor and directors at the date of action, some of whom had ceased to hold office before the horning was given. — *Grove v. Grant*, 3 P. 17 (1785); *M.* 11283.

39. Goods ordered by a partner prior to, but not delivered till after the death of another partner, form a debt against the partnership, but those ordered after the death of a partner abroad, but before the event was known, do not form a debt against the partnership. — *Cheap v. Aiton*, 2 P. 283 (1772); *Alt. M.* 14573.

40. A bank having appointed one of its partners to be agent in exchanging its notes with those of another bank, and the agent having assented to a new arrangement, under which he opened an account with the other bank, and drew upon it for the amount of notes of his own bank which came into its hands, does not in this way bind his own bank for the amount overdrawn in such account, but another partner of his own bank to whom he communicated the arrangement and who approved of it, may be bound. — *Moncreiff v. Dunlop*, 3 P. 595 (1797); *Aff.*

41. Where an individual was partner in two companies, held that, on the evidence, advances appearing in the books of the one company (which were not evidence against the other) to have been made by it, were fraudulently made to the common partner. — *Wilson v. Laidlaw*, 6 P. 222 (1816); *Rev.*

42. When a certain judicature is appointed under a company's act to determine all questions arising between it and others in pursuance or execution of the powers thereby granted, this does not oust the jurisdiction of the ordinary courts in respect of claims made on the ground that the company had not acted in pursuance of its powers. Road and canal companies must observe strictly their powers, under the penalty of damages in case of error or deviation. — *Shand v. Henderson*, 2 Dow, 519 (1814); *Rev.* *Goldie v. Oswald*, 2 Dow, 534 (1814); *Rem.* *Burnet v. Knowles*, 3 Dow, 280 (1815); *Aff.*

43. A company, or the other partners, cannot be sued for damages for malicious prosecution in respect of an alleged theft of partnership property, when the charge was only made by one of the partners as an individual. — *Arbuckle v. Taylor*, 3 Dow, 160 (1815); *Rem.*

44. When two bills were signed by a partner for the price of some goods, the firm is liable for both in the hands of endorsees for value, and there is no ground for a multiplepoining to ascertain which is to be paid. — *Davidson v. Robertson*, 3 *Dow*, 218 (1815); *Rev.*

45. A partner in a joint adventure may bind the other partners in respect of the dealings of the adventure. — *Davidson v. Robertson*, 3 *Dow*, 218 (1815); *Rev.*

46. Special circumstances in which a bill accepted by a partner under the partnership firm, alleged on one side to have been for benefit of the firm, and on the other to have been for a private debt, held not binding on the firm. — *Johnstone v. Phillips*, 1 *S. Ap.* 244 (1822); *Rev.*

47. Held on evidence that one company had no partnership with another though they had partners common to both. — *Learmonth v. Livingstone*, 1 *S. Ap.* 481 (1823); *Aff.*

48. Transactions under a particular contract commencing at a particular date, are not to be regarded as a continuation of prior transactions between one of the parties to the contract and an individual member of the firm which became the other party to the contract, even though the firm may pay acceptances made by their partner prior to that date, or a balance due to him. — *Downe v. Pitcairn*, 3 *W. & S.* 472; 4 *Bligh, N. S.* 550 (1829); *Aff.* 2 *S.* 658.

49. Neither a shareholder in a company nor its law-agent binds it by misrepresentation as to its affairs made to a purchaser of shares. The directors, if they declare dividends out of capital, are guilty of a conspiracy, and are liable criminally as well as civilly. But it is not misrepresentation if the balance-sheet does not disclose future contingent liabilities. — *Burnes v. Pennell*, 6 *S. Bell*, 541; 2 *H. L. Ca.* 497 (1849); *Aff.* 10 *D.* 689.

50. In an action by a banking company for money lent, it is a good defence that it was lent as part of a fraudulent transaction, the purpose of which was to sustain the public value of the company's shares, and the means were by inducing the borrower to believe that the shares were valuable, when in fact they were worthless, and so to purchase, through the company as brokers, its own shares to the amount of the loan. Observed that the report of the directors of a company, after being adopted by it, binds the company to its accuracy, and that the principal is liable for misrepresentations made by his agent, although the agent believed them to be true. — *National Exchange Co. v. Drew*, 2 *M'Q.* 103 (1855); *Aff.* 12 *D.* 950.

51. Directors of a joint-stock company are not liable for damages to a shareholder in respect of any act which the company has power to sanction, and does sanction, such as loss of funds by improvident

advances; but they are liable for false and fraudulent reports, and declaring false dividends, whereby a party is induced to purchase shares. The measure of damages in such a case is the difference between the price paid and the true value of the shares at the time of purchase. The whole of the directors need not be sued. — *Davidson v. Tulloch*, 3 M'Q. 783 (1860); *Aff.* 20 D. 1045; *Cullen v. Thomson's Trs.*, 4 M'Q. 424 (1862); *Rev.* 23 D. 574. See Fraud, 6.

52. The managers of a joint-stock company are the servants of the company and not of the directors, and are equally liable with the directors in damages for loss occasioned by the publication of false reports of its affairs. — *Cullen v. Thomson's Trs.*, 4 M'Q. 474 (1862); *Rev.* 23 D. 574.

See ACTION, 12, 13, 14—FOREIGN, 15—INSURANCE, 3—
MASTER AND SERVANT, 1—PUBLIC WORKS.

IV. TRANSFER OF SHARES.

53. The sale of shares to the remaining partners, in terms of the articles of copartnery, held proved by the minutes, though informal, and other evidence. — *Morison v. Smith, Robert.* 249 (1719); *Aff.*

54. The share of a partner being assigned to the company, under agreement with the Edinburgh directors, the company is not entitled afterwards to object that by its deed the consent of the directors in two other towns is requisite to such a transaction. — *Craig v. Douglas & Co.*, 2 P. 575 (1781); *Aff.*

55. An assignation of a share in a company, duly intimated, is not defeated by the assignor having held the share only in latent trust, the rules of the company not allowing such trust to appear in the books. — *Redfearn v. Sommervail*, 5 P. 707; 1 Dow, 50 (1813); *Rev.*

56. A partner in a joint-stock company having *ex facie* absolutely assigned his shares to a bank, which they accepted, they become partners, and cannot afterwards free themselves from liability as such by alleging that the assignation was in security merely, and that certain forms of transfer provided for in the deed of partnership had not been observed, the company, by accepting intimation of the assignation, having waived the right to insist on their observance; but costs not given to the company thus failing to observe its own rules. — *Allan v. Turnbull*, 7 W. & S. 281 (1834); *Aff.* 11 S. 487.

57. Recognition by payment of interest, &c., on the part of a company, of a transfer of a share, prevents it from founding on defect of form in the transfer. — *Drummond v. Hunter*, 7 W. & S. 564 (1835); *Aff.* 12 S. 620.

See ASSIGNATION, 11—PUBLIC WORKS, 13.

V. DISSOLUTION OF FIRM.

58. A joint-stock company may, after dissolution, sue in the company name for payment of contributions due by a partner. — *Gordon v. Douglas*, 3 P. 428 (1795); Aff. F. C. 11th July 1792.

59. In a partnership consisting of three persons, all of whom died, the last survivor leaving trustees, who for a short time carried on the business, but afterwards stopped it, while various actions were brought against the late company, the Court held entitled, on the application of executors of a predeceasing partner, to appoint a judicial factor on the partnership estate. — *Dixon v. Dixon*, 6 W. & S. 229 (1832); Aff. 10 S. 209.

60. On a firm being dissolved by death of a partner, unappropriated payments made to its creditors by the firm which continued its business, are to be imputed to discharge of the debts of the former firm, and after they are discharged, securities which had been granted by it are extinguished, and cannot be set up to cover debts incurred by the new firm. Therefore a new security over the same estate, granted to the same party by the apparent heir of one of the partners, is void as against the other creditors of his father, under the Act 1661, c. 24. — *Royal Bank v. Christie*, 2 Robin. 48; 8 Cl. & Fin. 214 (1841); Aff. F. C., 17th May 1839.

61. When a partnership is dissolved by death of one of the partners. it survives, for the purpose of winding up, in the other partners, and the representatives of the deceased are not entitled to have a judicial factor appointed, unless there be neglect or improper conduct. — *Collins v. Young*, 1 M'Q. 385; 2 Stu. H. L. 54 (1853); Rev. 14 D. 540.

VI. LIABILITY OF PARTNERS TO THIRD PARTIES.

62. Partnership in a joint adventure established by evidence, though there was no deed or articles, and each partner held liable for goods furnished to order of one who was authorised as *prepositus negotiis*. — *Cunningham v. Kinnear*, 2 P. 114 (1765); Aff.

63. A partner by a latent deed conveying all his interest to the other partners, but retaining right to a share in the profits, is still liable to the creditors of the firm. — *Boulton v. Mansfield*, 3 P. 70 (1787); Aff.

64. In particular circumstances, a party who had intrusted funds to a partnership held entitled to sue a partner who had subsequently retired, devolving the business of the old firm upon a new one, which had not been duly intimated to the client, to make good defalcations by the new firm on its bankruptcy. — *Graham v. Henderson*, 4 P. 421 (1802); Aff.

65. The partner of a company is liable for all bills drawn in name of

the firm, although some of them are on account of another firm of the same name, of which he is personally not a partner, unless the creditor has notice or reasonable grounds of suspicion that he is not a partner in the second firm. — *Fleming v. M'Nair (et e contra)*, 5 P. 632 and 639 (1812); *Aff.*

66. A father as administrator for his son, a partner in a company, cannot bind him by his admissions of debt, not being the authorised cashier or accountant of the firm. — *Wilson v. Laidlaw*, 6 P. 222 (1816); *Rev.*

67. A partner remains liable for company debts, although by a private agreement with the other partners he has accepted a fixed annuity in place of a share of profits. — *Gillon v. Mackinlay*, 5 W. & S. 468 (1831); *Aff.* 9 S. 90. *See* 9.

PATENT.

1. Prior use in England invalidates a patent in Scotland. — *Roebuck v. Stirling*, 2 P. 346 (1774); *Aff. M. Priv., Ap. 1, No. 2 Note. Brown v. Annandale*, 1 S. Bell, 70; 8 Cl. & Fin. 437 (1842); *Aff.* 3 D. 1189.

2. In an action for infringement of a patent for a chemical manufacture, to which the defence was insufficiency of the specification, and that the patent was only for a *modus operandi* with known materials to produce a known result, remit to frame issues to try—1st, Which of the patented improvements had been adopted by the defender; 2d, Which of them had been in use before the patent; 3d, In what particulars the patented improvements consisted. Direction that the patentee should be pursuer in the trial. — *Astley v. Taylor*, 1 S. Ap. 54 (1821); *Rev.*

3. Notorious public use of an invention before it is patented, though discontinued for some time before the patent, will invalidate it; but mere trials of an incomplete invention do not amount to public use. Query, Whether the patent would be void if the invention has, though at one time in use, been disused so long as to be quite lost sight of? — *Househill Co. v. Neilson*, 2 S. Bell, 1; 9 Cl. & Fin. 788 (1843); *Rev.* 5 D. 86.

4. A party having, on compromising proceedings instituted against him for breach of patent, bound himself to pay at a certain date for all the goods already manufactured in the mode specified, and for all the goods he might thereafter manufacture in that or any other mode within the patent, he is not allowed afterwards to dispute that the mode specified was within the patent. — *Baird v. Neilson*, 1 S. Bell, 219; 8 Cl. & Fin. 726 (1842); *Aff.*

See ACTION, 106.

PATRONAGE.

1. In an action by a patron against the presbytery, who had presented *jure devoluto*, to have it declared that he was patron, and had presented in due time, the Lord Advocate must be made a party. — Presbytery of Dunse *v.* Hay, Cr. & St. 475 (1750); Rev. M. 9911.

2. On a vacancy occurring, the Crown and a private party claimed the patronage, and each presented a clergyman. The Presbytery and General Assembly inducted the presentee of the private patron, but the Crown was afterwards found by the Court of Session to have right to the patronage. Held that the Crown presentee must be inducted, and that till this was done the stipend from the date of the vacancy occurring ought to be paid to the Crown, under the Act 1592, which is to be held as revived by the Act 10 Anne, though not expressly re-enacted. — Lord Advocate *v.* Dick (not reported), Lords' Journals, 9th May 1753; Appeal Cases.

3. The Crown is original patron of all parishes, and a grant of patronage to a subject may be lost by non user. — Lord Advocate *v.* Earl of Home, 2 P. 25 (1759); Rev. M. 10777.

4. A Crown charter of lands having also conveyed the patronage of the churches, benefices, and chapels of the same, and been followed by exercise on the part of the owner of the right of presentation to a parish of the same name as the lands, and in which they were situate, except when the exercise was suspended by forfeiture or Act of Parliament, the Crown is effectually divested. — Lord Advocate *v.* Douglas, 2 P. 104 (1765); Aff.

5. A conveyance of a patronage originally vested in a bishop, and made subsequent to the Act 1685 being ratified by Parliament in 1669, though never acted upon, is effectual. — Hepburn *v.* Earl of Portmore, 2 P. 218 (1770); Aff.

6. Right of patronage may be exercised by commissioners for the patron appointed for that purpose, and if so exercised prior to the patron himself presenting, the presentation of the commissioners is preferable. — Tait *v.* Keith, 2 P. 447 (1778); Aff. M. 9938.

7. Question as to the title and acts of possession of patronages which had been vested in the Bishop of Ross and been granted by the Crown. — Lord Advocate *v.* Mackenzie, 6 P. 43 (1814); Aff.

8. Where the heritors and elders of a parish have purchased the presentation, the presentation may be by vote, and the preses of the meeting has not a casting vote. A proxy by the curators of a female minor is void if not signed by her. Minutes of meeting of heritors, having been altered after the meeting, are not unexceptionable *prima*

facie evidence of its proceedings. — *Stirling v. Campbell*, 6 P. 238 (1816); *Aff. F. C. 4th March* 1813.

9. On a part of a parish being disjoined and erected into a new parish, endowed by subscription, the patron of the original parish has the right of presentation to the new one. — *Cunninghame v. Wardrobe*, 6 P. 734 (1762); *Aff. M.* 9933.

10. The patronage of the city churches in Edinburgh belongs exclusively to the Town Council, and an agreement that the kirk-sessions should have a vote, held reducible. — *Walker v. Drummond*, 6 P. 761 (1764); *Aff.*

11. General words of conveyance of patronages are capable of being interpreted by the usage following, and such conveyance and usage of the right form a good prescriptive title against the Crown. On an earldom being vested in the Crown by statute, and afterwards re-granted by the Crown, with all its rights and privileges, the grant carries patronages formerly annexed to it. — *Lord Advocate v. Lord Dundas*, 5 W. & S. 723 (1831); *Aff.* 8 S. 755.

12. It is lawful for the patron, with consent of the incumbent, to appoint an assistant and successor to him. — *Luke v. Mags. of Edin.*, 6 W. & S. 241 (1832); *Aff.* 10 S. 307.

13. A presbytery is subject to the jurisdiction of the Court of Session in case of refusal to take on trial and proceed with the settlement of a presentee to a parish, and it is bound so to proceed, and the General Assembly has no power to make an act infringing the right of patronage, by giving the communicants a right of veto. — *Presbytery of Auchterarder v. Earl of Kinnoul*, *M'L. & R.* 220; 6 *Cl. & Fin.* 646 (1839); *Aff.* 16 S. 661.

14. The individual members of presbytery who refuse to act in taking a presentee on trial, are liable in damages to the patron and presentee. — *Ferguson v. Earl of Kinnoul*, 1 *S. Bell*, 662; 9 *Cl. & Fin.* 251 (1842); *Aff.* 3 D. 778.

15. The heritors and elders of a parish having, under the Act 1690, c. 23, paid to the patron the 600 merks fixed in it as the price of the patronage, but not received a conveyance till after the passing of the 10 Anne c. 12; held that the patronage, as conveyed to them, was to be exercised as an ordinary patronage, and not as under the former Act, and therefore to be exercised not at a meeting, but by deed of presentation subscribed by a majority — *Cullen v. Sprot*, 1 *S. Bell*, 595 (1842); *Aff.* 3 D. 561.

See DEED, 17—LIFERENTER, 3.

PAWNBROKER.

It is illegal under the Pawnbrokers' Acts, that two parties should enter into a contract of partnership in that trade with the proviso that the name of only one of them should appear, and the affixing of penalties to the offence does not operate as a license to commit it on payment of the penalties. Reduction of the contract is not made incompetent by a clause it contains for the reference of all disputes to arbitration. — *Gorden v. Howden*, 4 *S. Bell*, 254; 12 *Cl. & Fin.* 237 (1845); *Rev.* 5 *D.* 698.

See ACTION, 134.

PEER.

1. Question, Whether a peer of Scotland is entitled on a reference to oath, to depone on honour. — *Earl of Breadalbane v. Innes*, *Cr. & St.* 181 (1736). *See Trust*, 2.

2. In absence of any patent, a peerage will be presumed to descend to heirs male, and the rule will not be altered by resignations and new charters of the family estate, in favour of heirs-general, these not specially referring to the title. — *Kennedy v. Earl of Ruglen (Cassilis)*, 2 *P.* 55 (1762).

3. In a claim to a peerage, a party alleging himself to be entitled, though he has not presented a claim, may be heard in opposition, but not a party who makes no claim to the dignity, but only to estates which are also claimed as passing under the same limitation. When it appears that a dignity might have been granted by letters patent to a series of heirs not including heirs female, it is to be presumed that it was not granted to a series including heirs female. — *Ker v. Innes (Roxburgh)*, 5 *P.* 601 (1812).

4. A claimant of a peerage is not entitled to an exhibition to him of the title deeds of the estate, which he does not claim, in order that he may take possession of the deeds relating to the peerage as his property. — *Craufurd v. Campbell*, 2 *W. & S.* 441 (1826); *Rev.* 2 *S.* 737.

See ACTION, 70—*ALIMENT*, 5—*LEGITIMATION*, 2—*MEMBER OF PARLIAMENT*, 2—*MINOR*, 7.

PERSONAL CAPACITY.

1. Proof before answer allowed of fraud upon, and facility in the maker of a deed executed thirty years before action of reduction, on a special

condescendence of particular instances being lodged. — *Ross v. Ross*, 6 P. 715 (1758) ; *Aff. Elch. Fraud*, No. 9.

2. A son may reduce on the head of facility, a ratification by his father of deed granted in prejudice of his (the father's) rights, under his parent's marriage-contract. — *Dallas v. Dallas*, 2 P. 91 (1765) ; *Aff.*

3. Evidence which was held not sufficient for the reduction of deeds from sixty to one hundred years old. — *Ross v. Ross*, 2 P. 393 (1776) ; *Aff.*

4. Deeds executed by a man above ninety years of age, who had had a shock of palsy, which had in some degree affected his memory and speech, but not sensibly his judgment, sustained. — *Scott v. Jerdon*, 3 P. 683 (1791) ; *Aff. M.* 4964.

5. Will reduced on the ground of weakness of mind of the testator, although it was not apparent to the witnesses to the execution. Interrogatories in writing allowed to be put to the defender, in whose favour the will was made. — *Pringle v. Dove*, 3 P. 521 (1796) ; *Rev.*

6. A lease reduced granted by a man of above eighty years of age, at a very inadequate rent, the commencement of the lease being only on the expiry of an existing lease which had still forty-four years to run, and obtained by a party having special influence, though entire incapacity in the grantor was not proved. — *Sime v. Viscount Arbuthnot*, 3 P. 613 (1797) ; *Aff.*

7. A deed signed in a different manner on each page by the grantor, held on evidence not to be liable to reduction on the ground of the age, intoxicated habits, and weakness of mind of the grantor ; a full price having been paid. — *Duncan v. Ritchie*, 4 P. 37 (1798) ; *Aff.*

8. Allegations that a testator had previously to the execution of the will been insane, and never after recovered mental vigour, but remained in a state of imbecility, though not insane, and was then practised on and importuned to make the will, and was blind, and did not hear the will read over, nor understand its import ; held to be either irrelevant or too vague. — *Thomson v. Tate*, 5 P. 176 (1807) ; *Aff.*

9. The solicitor who prepared a will executed a few hours before death, and the testamentary witnesses, having proved that the testator was in full possession of his faculties, which was supported by the terms of the will and other circumstances, it was sustained, although the physicians in attendance had previously stated that they considered him unfit for business from loss of mental power, and although the testator mis-spelt his signature. (Per Lord Eldon)—Protection is due from the House to the character of the solicitor so situated. — *Ker v. Wauchope*, 5 P. 547 (1812) ; *Aff.*

10. Insanity either before, or after, the doing an act, or the exe-

cution of a deed does not invalidate it, much less evidence of hereditary insanity, if the party was of competent mind at the time itself. — *M'Adam v. Walker*, 5 P. 673 ; 1 Dow, 148 (1813) ; *Aff. M. Proof, Ap. No. 34*.

11. Reduction of will on evidence of facility, and undue influence of testator's brother. — *Moffat v. Moffat*, 6 P. 181 (1816) ; *Aff.*

12. It is no objection to a testamentary or other deed that it was executed by one who had been insane, and contemplating the possibility of the return of insanity, if he was of sufficient disposing mind at the time. Reduction of deeds on ground of general insanity will hardly be admitted after the lapse of so much time that the witnesses able to speak to the special facts are dead. — *Towart v. Sellars*, 6 P. 301 ; 5 Dow, 231 (1817) ; *Rev.*

13. On its being established that a party whose *mortis causa* deed is challenged was of weak mind, but of understanding and capacity sufficient to understand the deed, if duly explained to him, but that it was, in point of fact, not consistent with his intentions in one particular, he will be held *quoad hoc* to have died intestate. — *White v. Ballantyne*, 6 P. 318 (1817) ; and 1 S. Ap. 472 (1823) ; *Rev.*

14. An agreement executed (in absence of his legal advisers) by a man of thirty years of age, and addicted to drinking, by which he discharged a debt of L.3000 heritably secured, in consideration of a bill for L.230, and an annuity at the rate of $7\frac{1}{2}$ per cent. on the balance for his life, held reducible. — *M'Neill v. Moir*, 2 S. Ap. 206 (1824) ; *Aff.*

15. An heritable bond granted by a facile person in security of an alleged debt to his law agents, who did not produce their accounts or vouchers, and from whom he desired a further advance, held reducible. — *Anderson v. Berry*, 2 S. Ap. 212 (1824) ; *Aff.* 1 S. 66.

16. A party found generally, by verdict of a jury, to be of mind capable of disposing of his estate, may be also found not capable of judging correctly respecting a deed declared irrevocable, and in such case, the deed being found to be not the free and voluntary act of the granter, though not proved to be obtained by undue influence, will be reduced. — *Gibson v. Watson*, 2 W. & S. 648 (1827) ; *Aff.* 4 S. 200.

17. A deed assigning to a daughter a property of L.3000, reserving only an annuity of L.40, executed without full understanding of it by a man eighty-three years of age, facile, drunken, and without taking other advice than the assignees, reduced at the instance of an assignee under a subsequent deed. — *M'Diarmid v. M'Diarmids*, 3 W. & S. 37 ; 3 Bligh, N. S. 374 (1828) ; *Aff.* 4 S. 583.

18. Habits of intoxication, however constant, are not ground for reducing a deed, if it is proved that at the time of actual execution the

party was sober enough to understand it, and fraud was not alleged. — *Mackay v. Davidson*, 5 W. & S. 210 (1831); Aff. 6 S. 367.

See ACTION, 3—FRAUD, 1, 2—LANDLORD AND TENANT, 4—MINOR, 11—
PRESCRIPTION, 16—REDUCTION, 4, 6, 10—TRUST, 1—WILL, 3.

POOR.

1. The Commissioners of Supply of the county, and magistrates of the burgh within the tolbooth of which a pauper criminal has been ordered by the Court of Justiciary to be confined, having petitioned the Court to permit his removal, as a dangerous lunatic, to an asylum, which was granted, the Commissioners of Supply are liable in his maintenance there, and have no relief either against his parish of settlement, or the burgh, or the Crown. — *Off. of State v. Comrs. of Supply for Wigton*, 4 W. & S. 43 (1830); Rev. 5 S. 767.

2. The poor-law of Scotland gives a title to relief to the “aged poor and impotent;” held that this does not apply to able-bodied persons out of work, nor to their children living with them. — *M^cWilliam v. Adams*, 1 M^cQ. 120; 1 Stu. 668 (1852); Aff. 11 D. 719. *Lindsay v. M^cTear*, 1 M^cQ. 155; 1 Stu. 668 (1852); Aff. 11 D. 719.

3. The parish of settlement of the father, however acquired, is the settlement of his legitimate children, without regard to the place of their birth. — *Adamson v. Barbour*, 1 M^cQ. 376; 2 Stu. H. L. 86 (1853); Rev. 13 D. 1279.

POOR-RATES.

1. Held that the members of the College of Justice were exempt from poor-rates in Edinburgh. — *Mags. of Edinburgh v. College of Justice*, 3 P. 155 (1790); Aff. M. 2418.

2. When a parish is partly burghal and partly landward, there is no distinction between the two parts as regards the liability of the heritors to maintain the poor of the whole. — *Mags. v. Heritors of Dunbar*, 1 S. & M^cL. 134; 3 Cl. & Fin. 335 (1835); Rev. 11 S. 879.

3. Land being by statute included within the royalty of a burgh, and subjected to its assessments, without being disjoined from the parish to which it formerly belonged, the poor-rates are no longer leviable upon it for the original parish, either directly or as a rider on the claim of the burgh, but are solely leviable by and applicable to the burgh. — *M^cCraw v. Cunningham*, 2 S. & M^cL. 773 (1837); *Alt.*

4. Lands disjoined from a parish by 39 and 40 Geo. III., c. 88, and annexed to a burgh, held not liable in poor-rates to the original parish. — *Ewing v. Burns*, *M'L. & R.* 435 (1839); *Rev.* 15 *S.* 936.

5. The poor-rate is a parochial burden; and when a statute directs it shall be levied on lands, it is leviable also on the houses afterwards built on the lands. — *Allan v. M'Craw*, 2 *Robin.* 507 (1841); *Aff.* 1 *D.* 513.

6. Lands disjoined by Act of Parliament from South Leith, and annexed to the parish of Edinburgh, but still left liable to parochial burdens in South Leith, held nevertheless liable to poor-rate only of Edinburgh. — *South Leith v. Allan*, 1 *M'Q.* 93; 1 *Stu.* 651 (1852); *Aff.* 11 *D.* 1391.

7. Although the terms of the poor-law as regards the rating of "owners" would apply to the manses and glebes of clergymen, yet as these had been formerly understood to be exempt, and the Act contained an express clause rendering clergymen liable to be rated in respect of their stipends, held that they were still exempt as regards manse and glebe. — *Gibson v. Forbes*, 1 *M'Q.* 106; 1 *Stu.* 890 (1852); *Aff.* 13 *D.* 341. *See* Parish, 26.

8. The parties receiving harbour dues ought to be rated, if liable at all, and not the dues themselves, and the rate ought only to be in respect of so much of the harbour as is actually within the parish. — *Leith Harbour Comrs. v. North Leith*, 2 *M'Q.* 28 (1855); *Rev.* 15 *D.* 95.

9. A water company is liable to be rated as owner of the land occupied by the water pipes. — *Edinburgh Water Co. v. Hay*, 1 *M'Q.* 682 (1853); *Aff.* 12 *D.* 1240.

10. Stations are to be considered, in rating to the poor, as part of the railway, and not rated specially in the parish in which they happen to be. — *Adamson v. Edin. and Glasgow Ry. Co.*, 2 *M'Q.* 331 (1855); *Aff.* 15 *D.* 537.

See BURGH, 20—PARISH.

PRESBYTERY.

1. The presence of parties, afterwards found to be disqualified, in a church court, does not avoid its acts. — *Livingstone v. Proudfoot*, 6 *S. Bell*, 469 (1849); *Aff.* 8 *D.* 898.

2. The minutes of a Presbytery are valid, although not signed at the time of the meeting. — *Fergusson v. Skirving*, 1 *M'Q.* 232; 1 *Stu.* 824 (1851); *Aff.* 12 *D.* 1145.

See ACTION, 2—COURT OF SESSION, 4—DAMAGES, 19—DISSENTERS, 1—PARISH—PATRONAGE, 1, 13, 14—TEINDS, 9.

PRESCRIPTION.

I. TRIENNIAL,	p. 259	IV. POSITIVE,	p. 260
II. VICENNIAL,	259	V. INTERRUPTION,	261
III. NEGATIVE,	259		

See also BILLS OF EXCHANGE—CAUTIONER—FOREIGN (*Actions*).

I. TRIENNIAL.

1. The triennial prescription is not interrupted by furnishings to the debtor's funeral. The executors are entitled to be relieved by the heir, after exhaustion of the personal estate, of the funeral charges (amounting in the case to L.421 for the funeral of a Lord of Session) without modification, and also of the costs of an action against the heir relative to the right of confirmation. — *Cockburn v. Hamilton, Robert*. 32 (1712); *Rev. M.* 4981 and 10343.

2. This prescription does not bar actions for aliment of minors. — *Davidson v. Watson, Cr. & St.* 288 (1740); *Rev. M.* 11077.

3. The triennial prescription applies to servants' wages. Question, Whether it would apply to money due on sales of cattle extending over a series of years? Although prescription may not apply, a long delay during which there are other dealings raises a presumption of payment. — *Macdougall v. Campbell*, 7 *W. & S.* 19 (1833); *Aff.* 8 *S.* 959.

See TRUST, 53.

II. VICENNIAL.

4. In a reduction of an adjudication it is not necessary, after twenty years, to produce the general and special charges on which it proceeded. — *Irvine v. Earl of Aberdeen*, 2 *P.* 419 (1777); *Aff. M. Ap. Tailzie No.* 1.

5. The vicennial prescription under the Act 1617, c. 13, applies to retours under a general service, whether feudal possession follows on them or not. — *Neilson v. Cochrane*, 1 *Robin.* 82 (1840); *Aff.* 15 *S.* 365.

See TRUST, 52.

III. NEGATIVE.

6. The negative prescription does not commence to run in favour of a trustee from the date of an assignation to him, but from the date of the payment of the money assigned. — *Gregory v. Grazier, Robert*. 178 (1716); *Aff.* 1716.

7. A right to lands is not lost by negative prescription for forty years, as against a party possessing without title. — *Mags. of Perth v. Presb. of Perth, Cr. & St.* 39 (1730); *Aff. M.* 10723.

8. A debt on a bond above one hundred and fifty years old, on

which adjudication had been taken just before the expiry of the first forty years, which twenty-five years after was called for in a reduction by another adjudger in possession of the estate, and being produced was exempted from reduction, which two years after was made the subject of an incompleated submission, and thirty-nine years afterwards was sued on, no demand or payment of interest having been made in the interim; held extinguished by prescription. — *Lord Advocate v. Hay*, 2 P. 266 (1758); Rev. M. 11276. See 18.

9. The benefit of a clause of return, or of a clause of substitution with prohibition to alter, may be lost by the negative or positive prescription. — *Duke of Hamilton v. Douglas*, 2 P. 449 (1779); Aff. M. 4358.

10. Prescription runs against the beneficiary under a trust-deed from the moment when he has a right to sue to restrain a breach of the trust, although he abstains till the death of the party committing it, because during his life the trustee could have, if challenged, effected the same result by legal means. — *Pollock v. Lockhart*, 2 P. 495 (1779); Aff. M. 10702.

11. A purchaser in a ranking and sale having granted bonds for the price payable to the creditors to be found to have right thereto in the decret of ranking, but the process having fallen asleep before such decret for more than forty years, the bonds are prescribed, and the Court will not order steps to be taken in the ranking at the instance of a creditor not proving *non valentia agere* if such steps would be invalid so far as the bonds are concerned. — *Dickson v. Brander*, 1 S. Bell, 167 (1842); Aff.

See BILL OF EXCHANGE, 2—ENTAIL, 25, 44—PARTNERSHIP, 33—PERSONAL CAPACITY, 1, 3—PROPERTY, 28—SUPERIOR AND VASSAL, 17—WAX, 3, 7.

IV. POSITIVE.

12. Question, Whether minorities of the opposing claimant are to be deducted in computing the positive prescription, and whether possession by a liferenter can be reckoned in the course of prescription, and whether the period of gestation in the case of a posthumous child is to be included? — *Campbell v. Campbell*, 2 P. 193 (1770); Rev. 5 Br. Sup. 915. See 24.

13. Infeftment in fee-simple for forty years in the lands, though originally effective only as regards the superiority, yet, when coupled with possession of the lands on apparency, gives a title by the positive prescription to the lands themselves, and works off the fetters of an entail under which the same party had right. — *Bruce v. Bruce*, 2 P. 258 (1772); Aff. M. 10805.

14. An absolute disposition for good consideration is not prevented from being the ground of positive prescription by the fact that a wadset of the same lands to the same party had been granted eight days before, with obligation to grant letters of reversion, but which remained unrecorded. — *Sutherland v. Countess of Sutherland*, 2 P. 415 (1777); Rev.

15. A disposition *a me vel de me*, on which base infeftment only is taken, and the titles on which are afterwards made up holding base of a subsequent disponee of the original granter, is by acknowledgment and prescription for forty years reduced to a holding *de me* only. Prescription on the warrandice begins to run from the date of the disposition of the superiority, by which a public entry is made impossible. — *Gardner v. Scott*, 2 S. Bell, 129 (1843); Rev. 2 D. 185.

16. Possession on charter and sasine for forty years does not exclude reduction of the conveyance on which it proceeded on the ground of fraud practised on a party of weak mind. — *Hume v. Duncan*, 5 W. & S. 43 (1831); Aff. 7 S. 467.

17. Possession of a barony under Crown charter for more than forty years, held to confer a good title to exclude against a party claiming the superiority of certain lands within the barony. — *Macdonald v. Lockhart*, 2 Stu. H. L. 104 (1853); Aff. See Heirs, 15.

See COAL, 5—DEED, 25—ENTAIL, 111—PARISH, 10, 14—PROPERTY—SERVITUDE—WAY, 3, 4, 5.

V. INTERRUPTION.

18. Adjudication on a bond kept alive by lodging a claim on it before the Commissioners for forfeited estates, on the debtor being attainted, and by registration of the claim, together with recognition of another debt included in the same adjudication. — *Lord Advocate v. Hay*, 2 P. 272 (1758); Aff.

19. The minority of a proprietor cannot be founded on to interrupt prescription where his only title was a conveyance to him by his father on the allegation he was going abroad, which is not proved ever to have been delivered. — *Ross v. Mackenzie*, 3 P. 676 (1776); Aff.

20. A party cannot plead the negative prescription against his obligation to grant a discharge where the bonds which he was bound to discharge are themselves prescribed. — *Wauchope v. York Bgs. Co.*, 2 P. 595 (1781); Aff. M. 10706.

21. An action of count and reckoning by a subsequent against a prior adjudger, who is in possession in virtue of the adjudication and charter and sasine, does not interrupt the running of the positive prescription so as to allow a reduction of the adjudication after forty years'

possession, except upon such grounds as were stated in the count and reckoning. — *Ross v. Mackenzie*, 3 P. 676 (1776); *Aff.*

22. Prescription is not interrupted by possession being violently prevented. — *Sinclair v. Earl of Breadalbane*, 6 P. 728 (1759); *Aff.*

23. The fact of being impressed into the Royal Navy during minority, and thereafter serving continuously in it, does not prevent the prescription, positive or negative, from running. — *Graham v. Watt*, 5 S. Bell, 172 (1846); *Aff.*

24. Prescription in Scotland (differing from the rule in England) is interrupted by a supervening minority. — *Baird v. Fortune*, 4 M'Q. 127 (1861); *Rev.* 21 D. 848. *See* 19.

See 1, 8, 12—BANKRUPTCY, 73—DEBT, 10—PARTNERSHIP, 38—
WAY, 3, 5, 7.

PRINCIPAL AND AGENT.

I. LIABILITY OF PRINCIPAL TO AGENT, p. 262	III. AUTHORITY TO BIND PRIN- CIPAL, p. 264
II. LIABILITY OF AGENT TO PRINCIPAL, 263	

I. LIABILITY OF PRINCIPAL TO AGENT.

1. Bonds being sent to an agent in London to be by him uplifted and the proceeds invested, together with any sums the bearer might advance for himself, the bearer is not entitled to make an investment of the proceeds by himself on the death of the agent; and the bearer having declared to the agent's son that the acceptance of the investment should be in the option of the principal, and the principal having declined to accept, without *mora*, he is not bound. — *Rigge v. Abercrombie, Robert*. 438 (1723); *Aff.*

2. Goods purchased by a factor at a foreign port lie at the risk of the principal, though the order being only partly fulfilled the factor had not advised the purchase. — *Sturrock v. Porter*, 3 P. 45 (1785); *Aff.*

3. Army agents having, on the representation of the paymaster that he had authority, charged the Colonel of the regiment with certain furnishings, and sued him thereon, are entitled, on the want of authority being established, to sue the Paymaster both for the sum and for the costs of the action against the Colonel. — *M'Donald v. Ross*, 2 Bligh, 547 (1820); *Aff.*

4. A commission-agent, purchasing under a special agreement as broker, is not entitled to retain the goods for the amount of advances

previously made on other goods which he had purchased as factor, and on sale of the goods retained after the principal's bankruptcy he must consign the whole price, though other creditors had meantime drawn a dividend beyond what the broker has done. — *M'Call v. Black*, 2 S. Ap. 188 (1824); *Aff.*

5. Agents chartering ships in their own names are entitled to be relieved by their principals of damages arising through failure of their principals to pay the stipulated freight. — *M'Braire v. Hamiltons*, 2 W. & S. 66 (1826); *Aff.* 4 S. 24.

6. After a lapse of twenty years, during which the parties were in frequent communication, without any question as to accounts of a business in which one had previously employed the other as agent, though these accounts had not been formally settled, the Court refused to allow any question of accounting to be gone into beyond what appeared on the face of the disputed accounts. — *Rose v. M'Leay*, 2 S. & M'L. 958 (1837); *Aff.* 12 S. 631.

II. LIABILITY OF AGENT TO PRINCIPAL.

7. A factor who has advised his constituent of the purchase of goods on his behalf and with his funds, charging commission on the purchase, is not allowed afterwards to allege that the goods were not, at the time, purchased nor paid for, from the funds not having been realised at the date of the advice, but were afterwards purchased at a higher rate, unless he could prove by the principal's oath that he was cognisant of the arrangement. — *Tham v. Sheriff, Robert*. 534 (1725); *Aff.* M. 10092.

8. A factor who takes bills instead of money for a debt due to his constituent, without notice to him, renders himself personally liable for the amount. — *Ainslie v. Arbuthnot*, 1 Cr. & St. 340 (1743); *Rev. M.* 4065.

9. The charging of a *del credere* commission by a factor, though not stipulated for by the principal, renders him liable to guarantee payment, and if he takes a bill for the price he is held to guarantee its payment when due. — *Mackenzie v. Scott*, 3 P. 525; 6 Br. P. C. 280 (1796); *Aff.* M. 10101.

10. A power of attorney being sent by executors to parties in Jamaica to wind up the affairs of a testator's estate there, and the attorneys having remitted bills for part of the amount to their own correspondents in this country, with instructions to hand them to the executors on receiving an indemnity against future claims, the correspondents are not entitled to withhold the bills to meet alleged deficiencies subsequently discovered in Jamaica. — *Bogle v. Anderson*, 4 P. 249 (1801); *Aff.* See Bills of Exchange, 17.

11. An agent selling goods, and guaranteeing the purchaser's bill for the amount, is not entitled to withhold delivery on the purchaser becoming bankrupt, and arranging with the creditors by payment of a composition, and thus making the agent liable for the balance of the price. — *Stirling v. Duncan*, 1 S. Ap. 389 (1823); *Rev.*

12. An agreement between the owner of goods and a merchant that the latter should sell them at a foreign port by his agent on the owner's account, guaranteeing the agent, and receiving 4 per cent. on the amount of sales for commission and guarantee, is a mere *del credere* obligation on the merchant, and does not make him liable for loss through the agent's breach of his instructions, and the evidence of merchants is not admissible to prove that the written agreement imports anything farther. — *Calder v. Aitchison*, 5 W. & S. 410 (1831); *Aff.* 9 S. 777.

13. An agent is liable for a sub-agent, though the principal knows that a sub-agent will be employed. — *Mackersy v. Ramsay*, 2 S. Bell, 30; 9 Cl. & Fin. 818 (1843); *Rev.* 2 D. 1003.

See CAUTIONER, 11.

III. AUTHORITY OF AGENT.

14. A special power to a factor to grant a particular lease, on which possession is given to the lessee, is not superseded or revoked by a subsequent power to another factor, granted before the lease is executed, to raise money by lease, mortgage, assignment, or other disposition. — *Patten v. Carruthers*, 2 P. 238 (1770); *Rev.*

15. A merchant abroad, for whom goods are purchased by a commission-agent in this country, is not liable to the sellers for the price, although the agent had bought them in his principal's name as well as his own, but in doing so had departed from the terms of the agreement and exceeded his authority. — *Wilkie v. Greig*, 4 P. 265 (1801); *Rev.*

16. A foreign merchant is liable for goods purchased by his factor in this country when it appears by his order, shown to the sellers, that they were purchased on his account in joint adventure with the factor. — *Wilkie v. Johnston*, 5 P. 191 (1808); *Aff.*

17. When a bank agent also does business as banker on his own account, receipts signed not as agent, and merely dated "bank office," do not bind the bank. — *Bank of Scotland v. Watson*, 5 P. 655; 1 Dow, 40 (1813); *Rev.* F. C. 15th May 1806.

18. Bills drawn, endorsed, and discounted by an agent in his own name only, though really for goods supplied by his principal, do not infer liability against the principal on the bankruptcy of the agent. — *James v. Telford*, 2 S. Ap. 219 (1824); *Rev.* 1 S. 290.

19. The agent, as factor for a party abroad, may act for him after his

death, but prior to receipt of credible intelligence of that event. — *Campbell v. Anderson*, 3 W. & S. 384 ; 4 Bligh, N. S. 513 (1829) ; Aff.

20. Third parties are not bound by a latent contract which would have converted a party they dealt with as agent merely into the actual principal. — *M'Phail v. Glennie*, 3 W. & S. 389 (1829) ; Aff. 3 S. 574.

21. A debtor having authorised a person to receive a fund due to him, and out of the proceeds to pay the debt, the agent having accepted that order is bound to pay the debt out of the fund, although the debtor's bankruptcy supervenes within sixty days. — *Macintosh v. Brierly*, 5 S. Bell, 1 (1846) ; Aff. 5 D. 1100.

See ASSIGNATION, 7, 10—EVIDENCE, 16—PARTNERSHIP, 50—PATRONAGE, 6—RANKING AND SALE, 1—SHIPPING, 2, 5, 6, 8, 11—SUPERIOR AND VASSAL, 6—TRUST, 33.

PROPERTY.

I. PARTS AND PERTINENTS, p. 265	IV. SEA-SHORE, p. 268
II. BOUNDARIES, 266	V. FERRIES AND HARBOURS, 268
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I. PARTS AND PERTINENTS.

1. The property in rocks in the sea claimed as part and pertinent by proprietors of opposite islands is to be determined by proof of usage in pasturing, gathering kelp, and the exercise of such other rights of property as may be practicable. — *Lord Macdonald v. M'Leod*, 2 P. 583 (1781) ; Aff.

2. Infeftment in lands, with parts, pendicles, and pertinents, together with customary possession of the teinds, forms a good title to the teinds. — *Morehead v. Edmonstone*, 3 P. 199 (1791) ; Aff.

3. The tenant of two farms belonging to the same landlord purchased one, with parts and pertinents as presently possessed by him ; held that he had no title to prove a servitude of taking sea-ware from the shores of the other, either in virtue of his own practice while tenant of both, or of immemorial practice in the farms of the original estate. — *Macdonald v. Macdonald*, 4 P. 237 (1801) ; Aff. See Servitude, 10.

4. A bounding charter having a clause of parts and pertinents will support a prescriptive title to lands beyond the bounds. — *Watt v. Paterson*, 2 Dow, 25 (1813) ; Aff.

5. Land held to be included in the titles as explained by possession. — *Duff v. Mags. of Inverness*, 5 P. 762 (1813) ; Aff.

6. A grant of mussel scalps by the Crown, supported by possession, sustained. — *Grant v. Brodie*, 6 P. 779 (1769) ; Aff.

7. The presumption of property arising from possession rebutted by evidence of agency brought to light in the judicial examination of the possessor who claimed the property. — *Turner v. Gibb*, 4 W. & S. 154 (1830); *Aff.*

8. A disposition of an inland part of a barony, with parts and pertinents, does not carry right to a part of the sea-ware on the shore, and the want of grant cannot be supplemented by usage of the tenants, unless amounting to prescriptive possession. — *Baird v. Fortune*, 4 M'Q. 127 (1861); Rev. 21 D. 848.

9. Immemorial possession of grazing ground under a clause of parts and pertinents, with a possessory judgment of the Sheriff, overrides an express conveyance of the lands in an ancient charter, which had continued to be engrossed in the titles of the opposing claimant. — *Mackenzie v. Mackenzie*, 6 P. 376 (1818); *Aff.* See *Heirs*, 15.

See SERVITUDE.

II. BOUNDARIES.

10. The natural marches on hill grounds may be considered in determining a disputed question of boundary. — *Whitson v. Ramsay*, 5 P. 664 (1813); *Aff.*

11. Remit to consider the evidence of boundaries, and whether the parties had not by mutual possession rendered the ground common. — Observed by Lord Redesdale that in case of Highland properties the possession of shealings is probably the strongest evidence of the right, and that buried charcoal is of little importance. — *Lord Seaforth v. Hume*, 2 Dow, 338 (1814).

12. When a claim is made to common property in the Highlands, founded on prescriptive possession, the evidence must be very strong, as trespasses are so easily committed. — *Fraser v. Chisholm*, 2 Dow, 561 (1814); *Aff.*

13. In wastes the boundaries are usually a line drawn by the eye from point to point. (Per Lord Redesdale.) — *Dixon v. Grahame*, 5 Dow, 266 (1817); *Rem.*

14. When lands are held in runrig, without any specific division of the minerals, the Court will presume that they are held in proportion to the lands as common property, and in default of evidence will presume that the lands are held in equal proportions. — *Forbes v. Livingstone*, 7 W. & S. 375 (1834); *Aff.* 10 S. 341. See *Coal*, 3.

15. Special case on titles, *Duff v. Grant*, 2 S. Ap. 310 (1824). The boundary between the Castle and the burgh property of Edinburgh defined. — *Mags. of Edinburgh v. Sec. for War*, 4 M'Q. 447 (1862); *Aff.*

See CONVEYANCING, 14—GAME—LANDLORD AND TENANT, 56, 57—
SALMON FISHING, 1, 19–30—SERVITUDE.

III. ROADS AND WATER.

16. The soil of a road dedicated to and used by the public for forty years remains with the original owner, and the conterminous owner is presumed to be the original owner, the public having only a right of use of the surface, and the owner of the soil may interdict the road being broken up to lay gas and water pipes, although it has been forty years under the management of road trustees, and the adjacent feuars hold from him an express grant of free ish and entry, and he has acquiesced in part of the road being broken up for the purpose in question. Observed that the road trustees might competently grant license for such purpose. — *Galbreath v. Armour*, 4 S. Bell, 374 (1845); *Rev.*

17. When a river or a road separates property, the soil up to the centre belongs to the respective proprietors on each side, and each may make any erection on his share therein not prejudicial to the other. — *Wishart v. Wylie*, 1 M'Q. 389; 2 St. H. L. 68 (1853); *Aff.* 13 D. 1100.

18. A road passing between two estates, and as to which both proprietors had exercised right of use, cannot be claimed by one as his exclusive property on parole evidence of purchase. — *Smyth v. Allan*, 5 P. 669 (1813); *Aff.*

19. A proprietor on one bank of a river is not entitled to erect jetties or embankments against the flood waters in such a way as to throw in time of flood a greater overflow of water upon the lands of the opposite proprietor. — *Menzies v. Earl of Breadalbane*, 3 W. & S. 235; 3 Bligh, N. S. 414 (1828); *Rev.* 4 S. 783.

20. When the lands of two or more persons extend round a loch, the presumption of law is that each has right to the solum from his own lands to a point in the centre, and on land being acquired by excambion, described as bounded by the loch, it carries right to the solum *ex adverso*. — *Cochrane v. Earl of Minto*, 6 P. 139 (1815); *Rev.* C. S. 1810.

21. A right to an equal use of a lake passes under a grant of parts and pertinents, and may be conveyed by a similar conveyance of part of the property, provided its exercise does not interfere with the right of the other owners. — *Menzies v. Macdonald*, 2 M'Q. 463 (1856); *Aff.* 16 D. 827.

22. Three conterminous proprietors having made an agreement to make a cut from a river through their respective lands for the purpose of obtaining water power, without any stipulation as to repairs, no one of them has a right to enter the lands of the others to see whether the cut is in proper repair, unless there is an actual obstruction or damage occurring. — *Weir v. Glenney*, 7 W. & S. 244 (1834); *Rev.* 10 S. 290.

See COAL, 6, 14—SALMON FISHING, 32, 34, 35—SERVITUDE.

III. SEA-SHORE.

23. A burgh has right to all the land acquired within its limits by accession from the sea, even against owners of property described as bounded by the sea. — *Smart v. Mags. of Dundee*, 3 P. 606; 8 Br. P. C. 119 (1797); Aff.

24. Where land feued by a corporation was described as bounded on one side by a river, the feuar has no right to soil afterwards acquired from the river by the corporation as trustees for improving the navigation. — *Todd v. Dunlop*, 2 Robin. 333 (1841); Aff. 2 D. 357.

25. Under a feu charter granting land bounded "by the sea-wall which divides the subjects hereby feued out from the sea-beach," the vassal has no right to land acquired from the sea beyond the sea-wall, and cannot acquire it by prescription. — *Kerr v. Dickson*, 1 S. Bell, 499 (1842); Aff. 3 D. 154.

26. A proprietor of land described as bounded by the sea-shore, is not entitled to enclose any part of the shore which is covered by the sea at the ordinary spring tides, and the Crown has sufficient right in the shore to entitle it to apply for interdict against such proceeding. Costs not given to the Crown. — *Smith v. Off. of State*, 6 S. Bell, 487; 2 H. L. Ca. 807 (1849); Aff. 8 D. 711.

See ADMIRALTY, 4.

V. FERRIES AND HARBOURS.

27. The holder of a right of ferry, with possession, having occasionally exercised it beyond the limits of his own lands, is entitled to interdict against a neighbouring proprietor establishing a ferry. — *Campbell's Trs. v. Campbell*, 6 P. 417 (1819); Aff. F. C. 18th January 1815.

28. Usage for forty years of loading and unloading vessels at a harbour within the limits of a grant of harbour, but without exaction of dues, operates by the negative prescription to relieve from liability to dues. — *Dundee Harbour Trs. v. Dougal*, 1 M'Q. 317; 1 Stu. 660 (1852); Aff. 11 D. 1464.

See PUBLIC WORKS, 3.

PROVING THE TENOR.

1. The tenor of a disposition of lands in liferent to a wife in substitution for provisions in the marriage-contract renounced by her, may be proved by the sasine, together with a disposition of the lands under

reservation of said liferent, and slight parole adminicles, and without proving *casus amissionis*. — *Cuninghame v. Hamilton, Robert*. 187 (1717); *Aff.*

2. In proving the tenor of a bond which already had been judicially produced, but which had been burned, it is not imperative to prove the name and designation of the writer and witnesses, and adjudication thereon should pass for interest and expenses as well as for the principal sum. — *Blackwood v. Hamilton, Robert*. 211 (1718); *Rev. M.* 15819.

3. A tailzie contained in a procuratory being lost, the *casus amissionis* must be proved, and without such proof the charter and sasine bearing to proceed on the procuratory do not prove the tenor of the tailzie. — *Marquis of Annandale v. Lord Hope, Cr. & St.* 108 (1733); *Rev.*

4. In a reduction improbation of a bond nearly one hundred years old, it was called for, and a registered extract only produced, the original being alleged to have been lost in the register, and the entail was alleged on the other side to be not conform to the register. Held that the tenor might be proved from the extract, and that registration, and the fact that the bond had been several times proved, rendered proof of a special *casus amissionis* unnecessary. — *Earl of Lauderdale v. Mackay*, 2 P. 234 (1770); *Aff.*

5. In proving the tenor of a deed fraudulently destroyed, the recollection of the writer that it was framed on the style of another deed in his office, allowed to be refreshed by his looking at the said deed, and when coupled with the recollection of its contents by parties who heard it read, the tenor held proved. The defender, in the action of proving, having stated defences which he must have known to be unfounded, he was subjected to the whole expenses. — *Rintoul v. Boyter*, 6 W. & S. 395 (1833); *Aff.*

6. The heir must prove a special *casus amissionis* of his predecessor's marriage-contract, in order to take away the presumption that it was destroyed with the intention of cancelling it, so as to allow the widow to set up her legal rights. — *Donald v. Kirkcaldy*, 3 P. 105 (1788); *Aff.* See Husband and Wife, 37.

7. A bond of annuity having been delivered back to the grantor by the grantee during insanity, as found by a jury, and the representatives having brought action upon it, in which of consent a proving the tenor was dispensed with, and no scroll or copy being produced, the contents were proved by witnesses who had read it. — *Marquis of Bute v. Cooper*, 4 W. & S. 335 (1830); *Aff.* 5 S. 831, and 7 S. 223.

8. A proving the tenor is unnecessary where the deed is set up merely by way of exception, but when it is essential to the plea its existence at one time must be proved before evidence of its contents is

admissible. — *Drummond v. Hunter*, 7 W. & S. 564 (1835); *Aff.* 12 S. 620.

See BANK, 3—ENTAIL, 210—TEINDS, 5.

PROVISION TO CHILDREN.

I. BY CONTRACT OF MARRIAGE, p. 270 | II. BY BOND, . . . p. 273

I. BY CONTRACT OF MARRIAGE.

1. Renunciations of their provisions under the marriage-contract, made by the younger children of the marriage, do not accrue to the share of the children not renouncing, but belong to the father. — *Allardice v. Smart, Robert.* 399 (1722); *Aff.*

2. A provision in a marriage-contract, of money to be laid out in land or other good security, and to be settled on husband and wife, and the longest liver, in conjunct fee and liferent, and the heirs of the marriage in fee, and of the conquest in lands or money to the heirs of the marriage, carries the moveables in both cases to all the children of the marriage equally. — *Allardice v. Smart, Robert.* 399 (1722); *Aff.*

3. On payment out of the price of real estate of creditors in preference to children's provisions, the creditors must assign their grounds of debt and diligences to the children, that they may operate relief out of any other estate. — *Lord Lovat v. Mackenzie, Robert.* 607 (1727); *Aff.*

4. A child of the marriage may, in consideration of a grant by the father of part of the provisions secured to him in the contract, renounce for himself and his heirs the rest of the provisions. *N.B.*—In this case it seemed that the child had survived the father without challenging the renunciation. — *Moodie v. Stewart, Cr. & St.* 20 (1730); *Aff.*

5. An obligation by the husband to secure heritably 30,000 merks to himself in liferent, and the eldest son of the marriage in fee, whom failing, to the husband's heirs whomsoever, followed by a clause providing, in case of there being one daughter, 18,000 merks to her; if two, 20,000 merks, and if three, 30,000 merks, in certain fixed proportions, payable within year and day next after their respective marriages, is interpreted under the following rules:—1st, The provision to daughters is distinct from that to the son, but a fourth daughter takes no share of it. 2^d, The daughters' provisions are payable within year and day of their marriages, without regard to the question whether, if paid, there will be enough left for the son's provision at his father's death. 3^d, The daughters having made their right real by diligence during the son's minority, he has no right to reduce their securities, or to

claim a *pari passu* ranking. — *Anderson v. Anderson*, Cr. & St. 136 (1734); *Rev. M.* 6590.

6. A disposition of his estate by a father to his eldest son does not bar the latter from claiming, in addition, his share of the provisions made to children in the contract of marriage. — *Pringle v. Pringle*, Cr. & St. 297 (1741); *Rev. M.* 11472; 5 *Br. Sup.* 693.

7. A marriage-contract having reserved power to the husband to grant provisions to children to the extent of L.3000, and failing his granting such provisions, or not charging the estate with the full L.3000, power being given to the wife to grant them to the extent of the balance; held that after he had granted provisions to the extent of L.2000, his widow was entitled to grant them to the extent of L.1000. — *Lady Forbes v. Lord Forbes*, 2 *P.* 84 (1765); *Aff.*

8. A provision being granted in a marriage-contract, of a sum of money, and the conquest during the marriage to the children of it in fee, "to be divided amongst them by the father," one of the children may renounce his or her share, and in that case the share so renounced falls into the father's residuary estate, and does not accrue to the other children. Acceptance by a daughter in her marriage-contract of a sum "as her share of conquest," is a renunciation of her claim under her father's contract; but a deed of gift to a daughter, as in full of her claims, does not exclude her, unless signed or accepted by her. — *Sinclairs v. Sinclair*, 2 *P.* 199 (1770); *Aff. M.* 8188. See 1, 6, 15.

9. An ante-nuptial contract of marriage, binding the father to pay certain provisions to younger children, apportionable as he should think fit, and payable only at his death, but bearing interest from the majority or marriage of the children, confers on them a *jus crediti*, and a right to use diligence or to compete with onerous creditors on the father's bankruptcy. But an obligation on the father to aliment and educate the children does not confer a *jus crediti*. — *Du Roveray v. Mackenzie*, 3 *P.* 409 (1795); *Aff.*

10. The estate and stocks provided by a marriage-contract to the children, having been sold by the father, the children are entitled only to the price received at the time, and not to the value of the subjects at the father's death. — *Earl of Wemyss v. Earl of Haddington*, 6 *P.* 390 (1818); *Aff. F. C.* 28th Feb. 1815.

11. A provision for daughters, made on the narrative that the estate is tailzied on heirs male, payable on marriage or reaching eighteen years, whichever should happen first after the dissolution of the marriage, which should be in full of all they could claim as heirs of line or otherwise; held not due when there were issue male of the marriage who forfeited through treason. — *Lord Advocate v. Drummond*, 6 *P.* 692 (1753); *Rev. Kames' Sel. Dec.* 18. See Will, 28.

12. A father having in his eldest son's marriage-contract bound himself to dispoise his estate to his son, subject to his own liferent, and under burden of his debts and provisions made by him for his younger children and grandchildren. Held, 1st, That he could not by subsequent gratuitous provisions defeat his eldest son's right under the contract; 2d, That gifts to younger children made in his life, subsequent to the contract, were not to be imputed in extinction of *mortis causa* provisions in their favour made by deed prior to the contract; 3d, That provisions by deed subsequent to the contract in favour of younger children were, in so far as less than the provisions made for them by deed before the contract, to be considered as in satisfaction of such provisions, and in so far as greater, as in fraud of the contract; 4th, That onerous obligations entered into for behoof of younger children after the contract formed debts against the estate, but were to be computed in satisfaction *pro tanto* of the other provisions due them. — *Miller v. Miller*, 1 S. Ap. 308 (1822); *Alt.*

13. A discharge by an only daughter of all her claims under her parents' marriage-contract is valid (if not obtained by fraudulent misrepresentation), although her father subsequently acquired a property greatly exceeding what he had at the date of the discharge. — *Mags. of Montrose v. Ewen*, 1 W. & S. 595; *Rev.* 2 S. 612.

14. A marriage settlement having provided the whole residue of the father's estate, heritable and moveable, to the children, and an only daughter and her husband having, on the eve of leaving the country, discharged this provision in consideration of a deed in which the father bound himself to pay L.157 at his death, and stated falsely that he had instantly paid a like sum, which sum was very insufficient as an equivalent to her rights under the contract. Held that the deed was *ex facie* fraudulent and reducible without the verdict of a jury. — *Ewen v. Mags. of Montrose*, 4 W. & S. 346; 2 *Dow and Clark*, 74 (1830); *Rev.* 6 S. 479 (*Sequel of 13*). •

15. By contract of marriage a sum was provided to younger children, and subsequently the father, having been a party to the marriage-contract of two of his daughters, in which he bound himself to pay each L.1000 down and L.4000 at his death, executed a trust-disposition declaring that these provisions were in full of all they could claim under his own marriage-contract, but conveying L.4000 to each of his unmarried daughters without any such proviso. One of these last subsequently married during his life, and in her marriage-contract he bound himself to pay her L.4000 at his death, without declaring it to be in full of her provisions, or of her right under his trust-settlement. Held that she was not entitled to the provision under her father's marriage-contract, but was entitled both to that secured to her in the

settlement, and to that secured to her in her own marriage-contract. — *Kippen v. Darley*, 3 M'Q. 203 (1858); Aff. 18 D. 1137.

See HEIRS, 20—LEGITIM—REAL BURDEN, 4—SUCCESSION, 2, 3.

II. BY BOND.

16. Bonds being granted by a father to his children, payable at their majority or marriage, and bearing interest after the date of payment, with an obligation on himself and his heirs to aliment and educate them till the bonds were payable, or, on failure to do so, to pay the interest on the provisions; and the children after their father's death being alimented and educated by their mother out of her jointure, this is to be considered as a gift to them by the mother, and they have a right either to the interest for failure or to the amount which aliment, &c., would have come to—*sed qu.* to which of the two. — M'Culloch v. M'Culloch, Robert. 611 (1727); Aff.

17. A bond of provision being granted to daughters payable on majority or marriage, the mother, with whom they lived, cannot claim aliment for them from their father's heir prior to the date of payment of the bonds, if they have, in fact, been alimented by a pension from the Crown. — *Lady Forbes v. Lord Forbes*, 2 P. 36 (1760); Aff.

18. A bond of provision being granted by a brother to his sisters, payable at majority, their claim for interest from the time when it is payable is not affected by their being alimented *aliunde*; but it will be held satisfied during the period they lived with the brother himself, to the extent equivalent to aliment, to be modified by the Court. — *Maitland v. Gordon*, 2 P. 43 (1760); Aff. M. 11161.

19. A trust-deed, *ex facie* for the purpose of making provision for children by a deceased wife, but reserving the grantor's liferent, delivered to his agent and that of the trustees, and on which the trustees were infeft, does not exclude subsequent creditors under a sequestration seven years after date of the deed. — *Paterson v. M'Caul*, 3 P. 571 (1797); Aff.

20. A father having, in consideration of the renunciation of a valuable lease previously granted by him to his son, given him on his marriage a bond in favour of the children of the marriage, a *jus crediti* is thereby created entitling them to compete with their grandfather's onerous creditors. — *Thomson v. Gourlay*, 2 S. Ap. 183 (1824); Aff.

21. A provision to a daughter in liferent allenary, and to her children in fee, to be held by trustees for these purposes, and declared to be in full to the daughter, her husband, children, or assigns, of all provisions or of legitim, &c., but which the daughter elects to renounce, betaking herself to her right of legitim, subsists nevertheless as to

the fee to her children. — *Dixon v. Fisher*, 6 W. & S. 431 (1833); Aff. 10 S. 55.

22. A discharge in the marriage-contract of a daughter of all claims competent to her of legitim or executry, or that she could claim in right of her father or mother, or by their decease, does not apply to a bond of provision previously granted by her mother to her, in exercise of a reserved faculty to burden an estate which she had conveyed to her husband. Observed that such bond of provision was heritable *naturá*. — *Glendonwyn v. Gordon*, 3 S. & M'L. 57 (1838); Aff. 13 S. 883.

23. When a deed of provision gives lawful interest on arrears, it is incompetent for the Court to cut it down to 4 per cent. — *Porterfield v. Corbet*, 1 S. Bell, 476; Aff. 2 D. 573.

See DEATHBED, 2—DEED, 28, 29.

PUBLIC OFFICE.

1. A Crown commission to the public office of conservator at Campvere reduced, with costs against the party, on the ground that a prior commission was in force, the acts of malversation on which the Crown had cancelled it not having been proved. — *Kennedy v. Cuming, Robert*. 19 (1711); *Rev. M.* 4433, and 22 *M. Suppl. Forbes*, p. 6.

2. Office of chief usher to the King is alienable and adjudgeable. — *Cockburn v. Cockburn*, Cr. & St. 603 (1755); Aff.

3. The appointment of Depute-Clerk of Session is for the life of the depute, not that of the principal clerk, but the principal cannot himself perform the duties of depute. — *Waddell v. Inglis*, 2 P. 205 (1770); Aff. M. 13134, and see 16633.

4. The office of Depute-Clerk of the Bills being sold by the principal clerk, reserving a proportion of the fees, held that such reservation did not apply to a subsequent increase of fees, reserving any decision as to the legality of the agreement at all, on the ground that that point had not been appealed. Opinion, per Lord Eldon, against the legality of sale of a public office, and that its recognition by Act of Sederunt does not make it legal. — *Stewart v. Miller*, 4 P. 286 (1802); Aff.

5. A purchase of a public office being made, reservation to the deputies of all their right therein, "so far as they have right thereto by the commission granted in their favour," does not prevent the purchaser from reducing the commission as vitiated and void. — *Walker v. Gibson*, 6 P. 441 (1819); Aff.

6. The Barons of Exchequer were entitled, under 6 Anne, c. 26, to appoint a messenger and porter, although the heritable usher and door-

keeper had by charter a right of appointing deputies. — *Craig v. Robertson*, 2 S. Ap. 113 (1824); *Aff.*

7. The profits of a public office not assignable do not pass under the general words in a trust-deed for creditors of the truster's "whole means and estate." Opinion, that if the office is not assignable, the profits of it cannot be. (Per Lord Cottenham.) — *Hill v. Paul*, 2 *Robin.* 524; 8 *Cl. & Fin.* 295 (1841); *Rev.* 1 *D.* 27. *See* 4, and *Bankruptcy*, 22.

8. A holder of an office for life having right to appoint a deputy may appoint the deputy for the life of the principal, but cannot appoint a joint-deputy unless authorised by custom. The right of patronage of appointing a deputy is not an "existing interest" in the office of the deputy, such as is saved by a statute subjecting it to reform on the death of the holders of existing interests. Costs borne by Crown of consent, though not a party. — *Earl of Rosslyn v. Aytoun*, 3 *S. Bell.* 70; 11 *Cl. & Fin.* 742 (1844); *Aff.* 3 *D.* 740.

See APPEAL, 71—BONA FIDE POSSESSION, 6—BURGH, 14—CAUTIONER, 12—CORPORATION, 5—CROWN—JUSTICE OF PEACE—SECURITY, 6.

PUBLIC WORKS.

1. Question, whether under power to take stone from lands adjacent, or lying convenient, to a public work, a quarry five miles distant, and in a different county, is included. — *Caledonian Canal Co. v. Grant*, 6 *P.* 110 (1810); *Alt.* *See* *F. C.* 13th Feb. 1813.

2. An Act of Parliament giving powers to deepen a canal, and in consideration of the expense incurred, to levy increased tolls, does not authorise such increase till the deepening is completed, and charges so made must be repaid. — *Dixon v. Monkland Canal Co.*, 1 *W. & S.* 636 (1825); *Alt.* 1 *S.* 145.

3. Certain harbour dues being given by the Statute 28 Geo. III. c. 58, in respect of all drag-boats, fish-boats, and yawls, and at a different rate in respect of every passage-boat, ferry-boat, or pinnace, and at a different rate in respect of all other vessels, whether ships, barques, or boats, and on the introduction of steam navigation new lines of passenger-boats being established; held that the steamers so plying regularly, and not carrying goods, should pay at the rate of passage-boat, ferry-boat, or pinnace, though they were not plying on the original ferry. — *Mags. of Edinr. v. M'Farlane*, 4 *W. & S.* 76 (1830); *Aff.* 5 *S.* 665.

4. A power to trustees of public works given in a private Act, to open quarries in a waste or common, and to dig, gather, and take away therefrom, stones, gravel, &c., does not entitle them to take and work a

quarry already opened on the common. — *Stonehaven Harbour Trs. v. Keith*, 5 W. & S. 234 (1831); *Aff.* 7 S. 405. See *Servitude*, 22.

5. An incorporated canal company is only bound to spend the money it is authorised to raise, and is not bound to complete the work it has undertaken to any further extent. — *Tennant v. Forth and Clyde Nav. Co.*, 1 *Robin*. 30 (1840); *Aff.* 16 S. 347.

6. A private Act of Parliament is binding, although due notice has not been given of the intention to apply for it to the party whose rights under a previous act it repeals. — *Edinr. and Dalkeith Ry. Co. v. Wauchope*, 1 S. Bell, 252; 8 Cl. & Fin. 710 (1842); *Aff.* 1 D. 1151.

7. A railway Act gave to a proprietor of land through which it passed a toll of $\frac{1}{2}$ d. per ton "upon all goods and articles on which a tonnage duty is chargeable or charged in virtue of this Act;" and under the clause fixing the rates chargeable for the "tonnage or conveyance of all minerals, goods, wares, and merchandise, and other things," power was given to charge for every carriage conveying passengers, &c., a certain rate per ton; and a subsequent Act repealed the rates and duties so granted in respect of carriages conveying passengers, and substituted a rate per head. Held that the toll was due on carriages conveying passengers according to the total weight of carriage and load, which, if not ascertained by actual weighing, might be ascertained on an estimated average, that the railway company was bound to render an account of the same, and that the second Act did not repeal the right to toll on such traffic. — *Edinr. and Dalkeith Ry. Co. v. Wauchope*, 1 S. Bell, 252; 8 Cl. & Fin. 710 (1842); *Aff.* 1 D. 1151.

8. A jury being summoned to assess the value of land, and the superiority thereof, proposed to be taken by compulsory purchase under an Act of Parliament, the parties are not too late to state the objection that the Act contemplated the purchase of the land only, and not that of the superiority; and on the Sheriff repelling the objection, a suspension and interdict against his proceeding with the trial is a competent mode of bringing the question of law under review. — *Reddie v. Todd*, 1 S. Bell, 459 (1842); *Aff.* 3 D. 586.

9. A railway Act enacted that the owner or occupier of any ground through which the railway should pass should be entitled to carry across it a road or railway within the grounds of such owner or occupier; held that the power extended to allow an owner to carry a railway across, within his own ground, for the use of lands of which he had become occupier subsequently to the Act. — *Monkland Ry. Co. v. Dixon*, 1 S. Bell, 347 (1842); *Aff.* 2 D. 1470.

10. Neither the standing orders of Parliament, nor any plans or notices given thereunder, prior to the passing a private Act, can be considered in construing it unless incorporated into it, although by an

inaccurate statement in these plans opposition to the bill has been obviated. The level of a railway, and the legal deviation from such level, is to be taken from the datum line and not from the surface level as shown in the deposited plans. — *North British Ry. Co. v. Tod*, 5 *S. Bell*, 185; 12 *Cl. & Fin.* 722 (1846); *Rev.* 8 *D.* 726.

11. A statute granting freedom from local duties on goods, the property of the burgesses of a town, providing that they, if required, should prove their property as accords with law, and make affidavit before a justice of the peace to the truth of their statement, warrants the trustees of the duties in detaining goods, and applying for a warrant of sale, where they had required such affidavit, and it was not furnished. — *Risk v. Muir*, 5 *S. Bell*, 14 (1846); *Aff.* 6 *D.* 677.

12. A private Act having given an unlimited power to take land for its purposes, but by a subsequent clause having expressly referred to maps and plans showing the site and extent of the works, and enacted that they should not deviate more than one hundred yards from the position of the said works, this makes the plans, &c., a part of the Act, fixes the extent of the works, and prevents the acquisition of more ground than is required for that extent, the deviation not being a grant of extended limits. Observed, that if the power to take lands is once exercised it cannot be resorted to again. — *Maule v. Moncreiffe*, 5 *S. Bell*, 333 (1846); *Aff.*

13. The register of shareholders is admissible though entitled Register of Proprietors, and the shares are sufficiently distinguished by number, if stated as No. 1551 to No. 1600, for example, and the amount paid is sufficiently stated if bracketed opposite the several entries to which it applies. A party who has transferred his shares, but the transfer of which has only been entered in a temporary register, and would not be entered in the regular register till next half-yearly meeting, is not a shareholder. — *Bain v. Whitehaven Ry. Co.*, 7 *S. Bell*, 79; 3 *H. L. Ca.* 1 (1850); *Aff.* 12 *D.* 829.

14. The parties having named arbiters under the Act, who appointed an oversman, but on the expiry of the arbitration and its prorogation by the parties, no oversman having been again appointed, the proceedings are void, as the statute declares they shall make such appointment before entering on the matters referred. — *Glasgow, Barrhead, &c. Ry. Co. v. Nitshill Coal Co.*, 7 *S. Bell*, 325 (1850); *Rev.* 11 *D.* 327.

15. It is sufficient if the last volume of the register of shareholders be sealed. A minute of meeting of the directors is correct if describing it as held on a certain day, although, in fact, it was adjourned to the following day, but which adjourned meeting, and the minute of its proceedings, was treated as one with the original meeting. The value of cancelled shares must be admitted in charging the shareholder with

arrears on calls. — *Inglis v. Great Northern Ry. Co.*, 1 *M'Q.* 112; 1 *Stu.* 749 (1852); *Aff.* 13 *D.* 1315.

16. The rule invalidating a contract by a trustee with the party for whom he is trustee is invariable, and applies to commercial as well as family trusts, and a director of a company is in this sense a trustee for the company, and his incapacity so to contract is not affected by the provision in the Companies Clauses Act, removing the director in such a case from his office. — *Aberdeen Ry. Co. v. Blaikie*, 1 *M'Q.* 461 (1853); *Rev.* 14 *D.* 66.

17. Under the enactment in the Clauses Consolidation Act, 8 and 9 Vict. c. 33, that a railway company shall charge equally all persons in respect of all articles passing over the same portion of, and over the same distance along, the railway, the company is entitled to make a lower total charge in favour of goods passing over a longer distance. — *Finnie v. Glasgow and S. W. Ry. Co.*, 2 *M'Q.* 177 (1855); *Aff.* 15 *D.* 523.

18. After an owner has, under the Lands Clauses Consolidation Act, 8 Vict. c. 19, § 36, stated his claim, and his desire that it should be tried by a jury, the company is bound, under § 37, to make an offer, and to apply to the Sheriff for a jury. Held that if they omit to make an offer, the Sheriff must refuse their application for a jury, and the company is then liable to the full amount of the owner's claim. — *Edinburgh, Perth, &c., Ry. Co. v. Leven*, 1 *M'Q.* 284; 1 *Stu.* 686 (1852); *Aff.* 10 *D.* 1013.

19. Under a statutory agreement to lease a railway and its branches on their completion, or on the completion of any part of them, the lease commences on completion of a part of the main line, though it was averred that the remainder could not be completed. — *Edinburgh and Glasgow Ry. Co. v. Stirling and Dunfermline Ry. Co.*, 2 *Stu. H. L.* 91 (1853); *Aff.*

20. Damages cannot be claimed before a jury called to assess the value of the land taken by a railway company, in respect of injury to the individual owner from a level crossing; and when a jury has erroneously given a sum for damages in that respect, as well as in respect of severance, &c., without distinguishing the respective amount, the verdict is bad *in toto*. — *Caledonian Ry. Co. v. Ogilvy*, 2 *M'Q.* 229 (1855); *Rev.* 15 *D.* 410.

21. A railway company is not bound by contracts entered into by the promoters before the Act is obtained, even though such contracts are matter of stipulation before the Parliamentary Committee, and sanctioned by it, if not within the authority contained in the Act. — *Caledonian and Dumbartonshire Ry. Co. v. Mags. of Helensburgh*, 2 *M'Q.* 391 (1855); *Rev.* 15 *D.* 148.

22. Members of a provisional committee are not liable for the acts of the committee, except in so far as they personally authorised such acts. — *M'Ewan v. Campbell*, 2 M'Q. 499 (1857); *Aff.* 16 D. 117.

23. A railway Act containing only enabling words is not obligatory on the company to construct the line, and a contract with a landowner for the purchase of the land, the price to be paid on taking possession, cannot be enforced against the company if they do not execute the line or take the land. — *Edinburgh, Perth, and Dundee Ry. Co. v. Philip*, 2 M'Q. 514 (1857); *Rev.* 16 D. 1065. *Scottish N. E. Ry. Co. v. Stewart*, 3 M'Q. 382 (1859); *Rev.* 18 D. 540.

24. Compensation given to a tenant by a railway cannot be claimed by the landlord on the tenant renouncing his lease under a power reserved. — *Peddie v. Brown*, 3 M'Q. 65 (1857); *Aff.*

25. Under a provision in a lease of a railway that the tolls to be taken shall be fixed by concert between the two companies, a reduced rate made by the line which became the lessee is not the rate contemplated in the lease, and consequently cannot be enforced. — *Finnie v. Glasgow and S. W. Ry. Co.* 3 M'Q. 75 (1857); *Aff.*

26. A debenture given for damages for intersection by a railway before its bill was obtained, construed with relative documents to be only a conditional obligation to pay before breaking ground, and an issue as to whether they had broken ground refused, on the ground that the sum in the debenture was to be modified according to the sum found due for land taken, and as the powers of taking land had never been exercised, no part of the agreement could be enforced. — *Scottish N. E. Ry. Co. v. Stewart*, 3 M'Q. 382 (1859); *Rev.* 18 D. 540.

27. The provisions of a railway Act, that all persons shall have liberty to use the line on payment of the rates specified (similar in terms to the Railway Clauses Act, 8 and 9 Vict. c. 33, § 15), free the company from liability for tolls on goods carried through a burgh which by charter is entitled to charge such tolls in general. An indemnification for loss of bridge tolls being directed by the Act to be settled by a jury; held that this based a claim for such tolls, and that the indemnification was to be a capital sum. — *Edinburgh and Glasgow Ry. Co. v. Mags of Linlithgow*, 3 M'Q. 691 (1859); *Rev.*

28. A railway company, though liable to an action for damages for not restoring a road they had interfered with, is not liable to an action of relief for damages and costs which the owner had been found liable to under an agreement with a tenant to repair and give him the use of the road. The statutory remedies for compensation apply to suits of the company within its powers, not in breach of its powers. — *Caledonian Ry. Co. v. Colt*, 3 M'Q. 833 (1860); *Rev.* 21 D. 1108.

29. A railway acquiring by amalgamation another line, is bound by

the contracts respecting width of bridges entered into by it with the landowners, and cannot widen the line without their consent. — *Edinburgh and Glasgow Ry. Co. v. Campbell*, 4 *M'Q.* 570 (1863); *Aff.*

See ACQUIESCENCE, 8—ARBITRATION, 26—BURGH, 18—CONVEYANCING, 7—INTERDICT, 3, 4—MINES AND MINERALS, 2—PARTNERSHIP, 42—POORRATES, 8, 9, 10—TRUST, 55, 56.

RANKING AND SALE.

1. The law agent and factor for a superior, who had obtained decree of non-entry, having consented that his claim should be postponed in a ranking and sale to other creditors, the superior cannot reduce the decree on the ground of not having given authority to his agent, nor on the ground that certain of the creditors who were ranked before him did not produce their titles till after the date of the decree. — *Lockhart v. Cheisly*, Robert. 80 (1714); *Aff.* 1714.

2. A contract regulating their several preferences having been made by creditors in prospect of a sale of the estate, which is not carried into effect, but the contract having provided that it should in that event still subsist, the contract subsists so as to regulate their preferences on a future sale, and being “concerning a personal subject, and no infetment having followed, it is effectual against the singular successors of the parties.” — *Fairholm v. Cockburn*, Robert. 317 (1720); *Aff.*

3. A. having adjudged B.'s estate, including an adjudication led by B. against C., and in virtue of which and of competing adjudications C.'s estate had been sold under a ranking and sale, A. cannot claim on the price without imputing *pro tanto* what he has drawn from the other portions of B.'s estate. — *Cooper v. Hunter*, Cr. & St. 376 (1744); *Rev.*

4. A decree of sale does not affect the rights of any parties not called in the action. — *Lord Advocate v. Urquhart*, Cr. & St. 586 (1755); *Aff. M.* 9922.

5. Debts secured over an estate sold by ranking and sale, cannot be kept in force as a security capable of being assigned to a creditor of the purchaser. — *Scott v. Seton*, 3 P. 682 (1789); *Aff. M.* 13371. See *Security*, 11.

6. The proprietor having objected to the valuation obtained by the common agent, but failed to press the objections, on which the Court pronounced an interlocutor fixing the valuation and appointing the sale, appeal against the interlocutor dismissed. — *Earl of Dundonald v. Bushby*, 3 P. 528 (1796); *Aff.*

7. The purchase of an estate by the common agent under a ranking

and sale having been reduced, and the cause remitted to the Court of Session to give all proper directions for carrying the judgment into effect, and the Court having appointed a new common agent, which was acquiesced in, the debtor is not entitled to object to further proceedings with a view to a sale, and the common agent is entitled to an interim order for his expenses out of the estate, to enable him to resist the objection and the appeal thereon. — *York Bgs. Co. v. Bremner*, 3 P. 586 and 593 (1797); Aff.

8. Balance of price of lands sold by judicial sale ordered to be con-signed, pending discussions of certain disputed debts on the estate, but not to be paid without notice to the purchaser. — *Frazer v. Macdonell*, 6 P. 295 (1817); Alt.

9. Interim warrant for payment of current annuities due under a bond of annuity granted by an heir of entail, which annuities include interest and principal, may be competently granted in a ranking and sale before the common agent is appointed. — *Ferrier v. Moubray*, 7 W. & S. 147 (1834); Aff. 10 S. 773.

10. When the titles of lands in a ranking and sale are hypothecated for a law agent's account, the Court may, in its discretion, order the sale to proceed without their production. — *Grant v. Findlay*, 4 S. Bell, 361 (1845); Aff.

See ADJUDICATION, 1—APPEAL, 18—BANKRUPTCY, 4—CONVEYANCING, 13—PRESCRIPTION, 11—SUPERIOR AND VASSAL, 6—TRUST, 30, 31.

REAL BURDEN.

1. A bond by the husband's father, either to employ a sum, paid under a marriage-contract, for the benefit of the estate, or to diminish to that extent his power of hurdening the estate, is moveable, and is not made heritable as against a prior adjudication, by a declaration in a decree reducing the marriage-contract that the sum shall stand as a real burden. — *Middleton v. Balfour, Robert*. 167 (1715); Rev.

2. A deed of entail to A. in liferent, whom failing, to a series of heirs in fee, providing also that A.'s liferent, and the fee of the other heirs should be affected, and stand burdened with the payment of all the lawful debts, and the performance of the deeds the entailor should happen to be bound in, does not make the personal debts of the entailor real, though repeated in the infestments following; but a power to personal creditors *nominatim* to appoint a factor to receive the rents till the specified debts are paid, makes their debts real. — *Lord Lovat v. Lady Lovat, Robert*. 355 (1721); Rev.

3. A conveyance to an eldest son and other heirs, with and under

the burden of the father's debts contracted or to be contracted, declaring that the son bound himself by acceptance of the deed to pay them, and under which burdens the conveyance was granted and not otherwise, does not make the debts real burdens, though the provision is repeated in the infeftments. — *Duff v. Gordon*, Robert. 372 (1721) ; Rev.

4. A disposition by a father to his eldest son, conveying his landed estate under proviso that he should pay sums to the wife and younger children of the grantor, conform to bond of provision of even date with the disposition, with obligation to infeft under the burdens before written, does not make such provisions a real burden. — *Allan v. Robertson*, 2 P. 572 (1781) ; Aff. M. 10265.

5. A piece of land being sold by absolute disposition, and resold by the purchaser to his brother, taking from him a backbond of obligation to make the first offer, on selling, to the original seller, and no infeftment being ever taken, but in a declarator of non-entry the Court having found that the backbond ought to be inserted in all subsequent investitures, and the ground being sold to a singular successor, whose creditors adjudged it ; remit to consider whether by the declarator of non-entry the backbond was made a real burden. *N.B.*—On remit, the Court held that not having in fact entered the investitures, it was not a real burden, but that the title of the owner being only personal, it could be adjudged only subject to the personal qualification contained in the backbond. — *Preston v. Earl of Dundonald*, 4 P. 331 (1802) ; Rem. M. 6569, and Personal and Real, Ap. No. 2.

6. A real burden may be imposed by reservation in a resignation *ad reman.*, and the creditor may point the ground, and in selling the lands is not obliged to account for meliorations made by the superior. — *Fraser v. Wilson*, 2 S. Ap. 162 (1824) ; Aff. F. C. 13th February 1822.

7. A real burden may be constituted without an irritancy by any clear form of words, and whether in a charter or burgage disposition, but must be consistent with law and public policy, and with the nature of the property ; and if it consists in the payment of money, the amount must be distinctly specified, and the party in whose favour it is conceived must have an interest to support it. An obligation to do an act may be made a real burden, but an obligation to pay the expense of doing it cannot, the expense being indefinite. (Opinion per Lord Brougham, that an obligation to grant a personal bond, or to employ the superior's agent in preparing titles, cannot be made a real burden.) — *Tailors of Aberdeen v. Coutts*, 2 S. & M'L. 609 (1837) ; 1 Robin. 296 (1840) ; Aff. 13 S. 226.

See LIFERENTER, 2—SECURITY, 12—SUPERIOR AND VASSAL, 16, 20–27—TRUST, 48.

REDUCTION.

I. OF DEED, p. 283 | II. OF DECREE, p. 284

I. OF DEED.

1. In the reduction of a title to an estate, objections of prescription, &c., being made to the pursuer's title to pursue, these must be discussed before the reduction is proceeded with. — *Earl of Breadalbane v. Earl of Caithness*, Robert. 459 (1724); Rev.

2. Objections being taken to the pursuer's title, founded on his infetment having been taken at a castle previously disjoined from the barony, and the sasine not having been signed on every page by the witnesses, they ought to be determined before assigning a term for production of the deeds called for. — *Duff v. Earl of Buchan*, Robert. 525 (1725); Rev. M. 16404.

3. Pending an appeal, bonds reduced in the Court are properly retained in its custody. — *Cochrane v. Lord Blantyre*, Robert. 558 (1726).

4. In reduction on the ground of furiosity, a condescendence of the facts from which it is inferred, of the time and continuance of the furiosity, and of the manner of proving, ordered before a proof allowed. — *Moodie v. Stewart*, Cr. & St. 20 (1730); Aff.

5. In a reduction of a lease on the ground of fraud, the allegations of fraud must be specific. — *Duke of Gordon v. Gordon*, 2 P. 26 (1759); Aff. M. 6678.

6. A deed by a woman, with consent of her husband, reduced on the ground of force and fear, where the cause of granting was a charge of forgery brought against her father, and a threat to have him hanged for it. — *Canison v. Marshall*, 6 P. 759 (1764); Aff.

7. Crown charter and sasine and prescription held sufficient title to exclude. — *Robertson v. Duke of Atholl*, 6 P. 116 (1815); Aff.

8. Question, Whether after decree of absolvitor in a reduction, on the application of the raiser to be allowed to withdraw it, he can raise a fresh action of reduction. — *Duke of Roxburgh v. Kerr*, 1 S. Ap. 157; 6 P. 820 (1822); Aff. See 14.

9. Under the A. S., 1st January 1726, it was held competent, before great avizandum in a reduction on the ground of forgery, to add a conclusion for reduction *ex capite lecti*. — *Hutton v. Gibson*, 2 S. Ap. 110 (1824); Aff.

10. A legacy being left to a woman addicted to intoxication, and of weak mind, a deed executed by her declaring that it belongs to her in liferent only, and conveying her interest, may be set aside by exception if gratuitous and unrecorded, but must be reduced if onerous and

recorded ; and the grantee of the deed is liable in interest at five per cent. on all sums he had drawn, but entitled to commission at two and a half per cent. on sums he had recovered. — *Brown's Trs. v. Brown*, 4 W. & S. 28 (1830) ; Aff. 4 S. 108.

11. An action of reduction on the Act 1696, c. 5, having libelled only part of the transactions intended to be challenged, which was not discovered till after a verdict in favour of the pursuer, he brought a supplemental action craving repetition of the sums not included in the former, but not libelling the Act nor containing reductive conclusions. Held that in respect of these defects it must be dismissed without determining whether, had they not existed, it could have been competently conjoined with the original action. Opinion, that if it had been treated as an independent action the verdict in the first might have been given in evidence under it. — *Pattison v. Allan*, 7 W. & S. 26 (1833) ; Aff. 9 S. 317 and 599.

12. Question as to the propriety of allowing the unsuccessful pursuer of a reduction of a trust-deed his costs out of the estate. — *Earl of Strathmore v. Paul*, 1 Robin. 189 (1840).

13. Question, How far the whole parties to a certain transaction can bring a reduction to set it aside, when by its effects the interests of third parties are affected. — *Dixon v. Fisher*, 2 Robin. 345 (1841) ; 2 D. 1121.

14. The objection of competent and omitted applies only to defences, not to reductions. A reduction need not state more than one ground, and subsequent reductions may state others. — *Macdonald v. Lord Macdonald*, 1 S. Bell, 819 (1842) ; Aff. 2 D. 889. See Bankruptcy, 37.

See ENTAIL, 168–173—MEMBER OF PARLIAMENT, 1—PAWNBROKER—PROVING THE TENOR, 4.

II. OF DECREE.

15. In a reduction of a decree of sale in a ranking and sale, on the ground that it was obtained by fraud and collusion, a demand for production of the adjudications and grounds of debt on which it proceeded, is not barred by production of the decree itself, and of the ratification of it under the hand of the pursuer's predecessors. — *Irvine v. Earl of Aberdeen*, 2 P. 249 (1770) ; Rev.

16. Suspension of an extracted decree *in foro* is incompetent. — *Irvine v. Valentine*, 3 P. 287 (1793) ; Aff.

17. Decree by consent, and decree by default, in favour of the defender, may be reduced by the pursuer. — *Millie v. Millie*, 5 P. 160 (1807) ; Aff. M. 8215.

18. In an action of reduction of a decree in absence, and repetition

of sums paid under it, it is incompetent to grant repetition without first reducing the decree. Observations on the objectionable principle of allowing decrees in absence without proving the case, and allowing them to be reduced although the defender has had full notice. The attendance of the defender's agent at taxation of a decree in absence, and his getting the form of the decree modified, will not make it a decree *in foro*, unless his authority, if denied, be proved. (Per Lord Brougham.) *Wilson v. Sinclair*, 4 W. & S. 398 (1830); Rev. 7 S. 401. See 22.

19. Decree for expenses in name of the agent cannot be suspended on the ground that the agent had not an attorney's license, the objection being then too late. — *Ewing v. Wallace*, 6 W. & S. 222 (1832); Aff. 9 S. 385.

20. A judgment in 1782 in an action to which an alleged heir of entail was a party, and which was *in foro* as to him, is not capable of being opened up by his son as having been in absence as to him. Interpretation of various judgments of the House in prior appeals in the same case. — *Maule v. Maule*, 6 W. & S. 586 (1833); Rev. 9 S. 876.

21. A decree in an action of declarator and interdict, pronounced in terms of the libel in default of the defender's satisfying production after appearing, lodging defences, and taking a term, is *in foro*, and constitutes *res judicata*. And a decree, though not extracted, cannot, after twenty years, be set aside by exception, on the ground that it was pronounced in an action asleep, or not conjoined with another, the evidence of wakening or conjunction being the warrants only of the decree. — *Mags. of Dingwall v. Mackenzie*, 7 W. & S. 306 (1834); Aff. 7 S. 383.

22. Remit to consider whether it is competent, after a lapse of forty-four years, during twenty of which there was a party *valens agere*, to reduce a decree of certification in a reduction in which the defenders appeared, but without satisfying the production; and a decree of reduction in a reduction improbation, in which the defenders satisfied the production, but did not lodge defences. Observations by Lord Brougham on the evils of decrees in absence, and consequent reductions thereof. Observed that the decision of the Court on the remit, being on a point of practice, would probably be final. — *Brown v. Sinclair*, 2 S. & M'L. 103 (1835); Rem. 13 S. 594. See 18.

See TEINDS, 4.

SALE.

I. OFFER AND ACCEPTANCE, p. 286	III. MISREPRESENTATION AND
II. DELIVERY, 287	FRAUD, p. 288

I. OFFER AND ACCEPTANCE.

1. Letters of offer and answer not being in all particulars at one, and referring to a scroll of a deed to be adjusted and prepared, though in part acted upon, do not form a concluded agreement, and therefore either party may resile. — *Alexander v. Montgomery*, 2 P. 300 (1773); (*Aff. by equality*).

2. An inquiry respecting the price of goods and terms of sale answered by the vendors giving the requisite information, does not amount to an offer on the part of the vendors, so as to bind them to adhere to the price, and to sell to no other party in the meantime. — *Duguid v. M'Leish*, 3 P. 320 (1794); *Aff.*

3. A merchant inquired of a manufacturer the lowest price of his goods; the latter replied, stating his terms, and adding, "Expecting your answer in course." Held that no answer being received in course, he was not bound, and that the former course of dealings between the parties was not admissible in evidence. — *Stein v. Farries*, 4 P. 131 (1800); *Rev. M.* 8482.

4. Correspondence held to amount to a contract to deliver goods within a reasonable time, and therefore prior to an Act coming into operation, which declared the sale of such goods illegal, and damages given for breach of contract in not delivering. — *Philips v. Blair*, 4 P. 256 (1801); *Rev.*

5. Letters between seller and buyer, in which each in succession objects to the offer made by the other, and proposes new terms, do not constitute any concluded bargain; but if the goods are despatched by the seller subsequent to receipt of the last offer from the buyer, that constitutes the terms of the bargain, although, in forwarding the invoice, the seller objects to these terms. — *Robertson v. Harford*, 6 W. & S. 1 (1832); *Rev.* 9 S. 352.

6. The fact of an estate being for sale being mentioned by the seller to another, who thereupon says he is not unwilling to treat, if, on receiving information of the particulars, it will satisfy him, does not bind the seller, even though he furnishes the particulars. — *Milne v. Robertson (Marjoribanks' Trs.)*, 2 S. & M'L. 494 (1837); *Aff.* 14 S. 533.

7. An acceptance of an offer of sale, posted on the day of receipt of the offer, concludes the contract, although accidentally dated the day following, and not delivered in due course. — *Dunlop v. Higgins*, 6 S. Bell, 195; 1 H. L. Ca. 381 (1848); *Aff.* 9 D. 1407.

II. DELIVERY.

8. A foreign cargo being shipped, at the risk of the shipper, but under a general contract to ship goods to the consignees in return for shipments made by them, the property in the cargo is transferred to the consignees. — *Hastie v. Arthur*, 2 P. 251 (1770); *Rev. M.* 14209.

9. Goods being sold by written contract, which stipulated for the price being paid by bills, and before the bills were granted, but after part delivery, the purchasers having become bankrupt, and returned the contract of sale and the goods delivered, the seller is entitled to retention of the whole as against the other creditors. — *Hill v. Buchanan*, 3 P. 47 (1785); *Aff. M.* 14200. See Bankruptcy, 13, 14.

10. A party having bought wood of a Russian firm, but failed before it could be shipped, and desired the firm to resell it, the firm is justified in retaining it at a valuation of its value at that date. And the price having been stipulated to be paid in drafts on Amsterdam, the vendors are entitled to be paid on calculation of the rate of exchange between this country and Russia at the date of the valuation. — *M'Lean v. Thorley*, 4 P. 22 (1798); *Aff.* See Action, 145.

11. Bonded goods being sold and a delivery order granted, which was noted in the warehouse keeper's books, and bill at four months granted for them by the purchaser, who became bankrupt before it became due, the vendors are not entitled to retain the goods still remaining in the warehouse. — *Spence v. Auchie*, 5 P. 291 (1810); *Rev. M.* 14226.

12. A party buying goods from private knowledge of an impending rise in value is entitled to damages for non-delivery, estimated according to the price at the date of commencement of the action. — *Boswall v. Morrison*, 5 P. 649 (1812); *Aff. M. Damage and Interest*, *Ap. No.* 1.

13. Under a contract to deliver goods free on board at a certain price, as soon as a ship could be obtained, prior to which event an increased duty was imposed by an Act, which authorised any person who had contracted to sell before its passing, to add the amount of the duty to the stipulated price; held that the vendor had not completed the contract by delivery, and was therefore entitled to add the duties. — *Haig v. Napier*, 1 Dow, 255 (1813); *Rev.*

14. A purchaser is not liable for the price of goods shipped for him, if the invoice and notice of the shipment is not sent off at the time of shipment, correctly stating the vessel by which shipped, so as to permit him to insure on correct representation. — *Arnot v. Stewart*, 6 P. 289; 5 Dow, 274 (1817); *Aff. F. C.* 25th Nov. 1813.

15. A bargain being made for delivery of wheat, or payment of the

fiars price, for the fixed rate of 30s. per boll during ten years; question, whether it was a contract of sale or a wager. Judgment, that the bargain could not be assigned without writing, unless followed by *rei interventus*. — *Clark v. Callender*, 6 P. 422 (1819); *Aff. F. C.* 9th March 1829.

16. Statements by the seller's broker that the goods were being shipped, or about to be shipped, for the port of delivery, are not sufficient to warrant the purchaser in withdrawing from the bargain on their non-arrival by the first ships thereafter, the sellers appearing to have used all due dispatch in forwarding them. — *Dunn v. M'Gavin & Co.*, 1 W. & S. 4 (1825); *Aff.* 2 S. 52.

17. Delivery of the keys of a bonded warehouse is complete delivery of the goods it contains, and a sale so completed does not need to be in writing, or entered in the books of the Revenue officers, not falling under the Acts 4 Geo. IV. c. 24, § 82, and 6 Geo. IV. c. 112, § 9. — *Maxwell v. Stevenson*, 5 W. & S. 269 (1831); *Rev.* 8 S. 618.

18. Property sent by a carrier being lost, the sending of the invoice to the consignee, by which it appears that it had been insured and the carriage paid by the consignor, and the amount charged against the consignee, does not necessarily prove that in law the consignor was divested of interest in the goods, and the question whether the property had been absolutely transferred is for the jury. — *Dunlop v. Lambert*, M'L. & R. 663; 6 Cl. & Fin. 600 (1839); *Rev.* 15 S. 54, 1232.

19. A delivery order, addressed to the agent of the vendors, in whose name goods were warehoused, does not pass the property as endorsement of a bill of lading would, and the goods, while undelivered, remain subject to a lien for the price, although in the meantime sold by the first purchaser to a third party. — *M'Ewen v. Smith*, 6 S. Bell, 340; 2 H. L. Ca. 309 (1849); *Aff.* 9 D. 435.

20. Question, Whether, on a sale of bonded goods by A. to B., who again sells to C., A. can, on B.'s bankruptcy, retain so much of the goods as C. had not obtained actual delivery of, although he had paid for them to B. — *Melrose v. Hastie*, 1 M'Q. 698 (1854); 13 D. 880.

21. A promise to deliver goods when required to the party presenting the document is invalid in the hands of a third party, unless the contract is recognised with him by the seller. — *Dixon v. Bovill*, 3 M'Q. 1 (1857); *Aff. Mackenzie v. Dunlop*, 3 M'Q. 22 (1857); *Aff.* 16 D. 129.

See SHIPPING, 4.

III. MISREPRESENTATION AND FRAUD.

22. Damages given for fraudulently substituting inferior goods in the casks on sale. — *Miller v. Alexander*, 6 P. 718 (1758); *Aff.*

23. A sale being made of linseed, described as Philadelphia, instead of which Virginian linseed, of damaged quality, was delivered, the vendee held entitled to refuse payment, although prior to delivery it had been shown to his son, who was sent to the vendor's warehouse to settle as to its transmission. — *Gray v. Ogilvie*, 2 P. 215 (1770); *Rev.*

24. Retention of price, and an action of damages for loss, are competent on proof that a representation that goods were fit for a certain purpose, and equal to other goods of known quality, was false. — *Birnie v. Weir*, 4 P. 144 (1800); *Aff.*

25. A purchaser cannot indemnify himself for misrepresentation as to the value of the goods by ordering more, and refusing to pay for them, not having given immediate notice of his objection to those first purchased. — *Mitchell v. Jamieson*, 6 P. 24 (1814); *Aff.*

26. A purchaser is bound to object on receipt of the goods in respect of any defect of quality, but he need not object till called on for payment in respect of any deficiency of quantity or short weight. — *Robertson v. Harford*, 6 W. & S. 1 (1832); *Rev.* 9 S. 352.

27. A sale of copyright and unsold copies made on offer "as lately exposed for sale at auction," held not to include copies in the hands of booksellers, as these were not included in the inventory to which the conditions of sale at the auction referred, and over which the booksellers claimed a lien. — *Doig v. Sangster*, 6 P. 265 (1817); *Aff.*

28. Price of a horse warranted free from vice and quiet in harness is not recoverable on his kicking and running off two months after the purchase, having been frequently driven and gone quietly in the interval, although the seller had notice that he had formerly done the same, and concealed it, and had also falsely represented the horse as having been sent from England. But costs on affirmance refused on the ground of such misrepresentation. — *Geddes v. Pennington*, 6 P. 312; 5 Dow, 159 (1817); *Aff. F. C.* 19th May 1814.

29. In Scotland, damages for breach of contract of sale are estimated by the jury on a view of the whole circumstances. Rule approved by Lord Cottenham. — *Dunlop v. Higgins*, 6 S. Bell, 195; 1 H. L. Ca. 381 (1848); *Aff.* 9 D. 1407.

See CONTRACT—CONVEYANCING (*Errors, &c.*)—WARRANTICE, 1, 2.

SALMON FISHING.

I METHODS,	p. 290	III. RIGHTS OF GRANTEES, . . .	p. 293
II. EXTENT OF GRANT, . . .	292		

I. METHODS.

1. Where the Tweed divides England and Scotland, the middle line of the river is the boundary, and the salmon-fishing laws of Scotland apply to the northern half of the bed. — *Duke of Roxburgh v. Earl of Home*, 2 P. 358 (1774); *Rev. M.* 14272.

2. A right of cruive fishing in a river may be granted by charter, and an interlocutor finding that he has right to fish by coble or in any other lawful way, does not preclude a party from setting up a right to a cruive fishing. — *Duke of Gordon v. Grant*, 3 P. 679 (1776); *Rem. See S. C.* 2 P. 582.

3. Remit to consider whether stent-nets, being immemorially used, are objectionable under the statutes prohibiting cruives; also whether an interlocutor finding that an inferior heritor has a title to pursue in an action for abolishing a new and destructive method of fishing, establishes his title to sue against an ancient and comparatively harmless method. — *Colquhoun v. Mags. of Dumbarton*, 4 P. 221 (1801); *Rem. M.* 12827.

4. The rule of a mid-stream in cruive fishing is lost by desuetude. The Court has power to modify or explain the statutory rules applicable to cruives, *e. g.*, to require that the spars shall be of an oval form, or to modify, where necessary, the rule of the Saturday slap. It is the duty of the Court to ascertain and prescribe what are the rules by which such fishings must, in special circumstances, be regulated. — *Johnstone v. Stotts*, 4 P. 274 (1801); *Aff.*

5. A Crown charter of salmon fishings used and wont warrants a custom of fishing similar to, but not identical with, cruives, but it must be exercised subject to the regulations of cruive fishing. — *Johnstone v. Stotts*, 4 P. 274 (1801); *Aff.*

6. Stake-nets in the estuary of the Tay held illegal under the Act 1563, c. 68. — *Hunter v. Earl of Kinnoul*, 4 P. 561 (1804); *Aff. M.* 14301.

7. Interdict refused against fishing by stake-nets at the mouth of the Firth of Tay until the question of right had been tried, a decision of their illegality in regard to other parties not being *res judicata*. — *Earl of Kinnoul v. Dalgleish*, 4 P. 671 (1805); *Aff. See* 11, 13.

8. The House having remitted to the Court to direct that a cruive dyke and cruive boxes must be regulated according to law, and the Court having ordered the cruive boxes to be covered at top, remit

again to consider whether such direction is according to general law, or only applicable to the particular river. — *Johnstone v. Stotts*, 5 P. 119 (1806); Rem. See 4.

9. A right to fish by a yair does not authorise altering it into a stake-net. A grant of fishing with a yair may be established by possession to include salmon. — *Graham v. Dixon*, 6 P. 163 (1816); Aff.

10. A stoup-net fishing granted in a charter held to be a species of pock-net fishing, and prohibited by Act 1698 as to the River Forth. — *Lord Erskine v. Mags. of Stirling*, 6 P. 774 (1765); Aff.

11. Salmon fishing with stake-nets in the Firth of Tay is illegal. — *Dalglish v. Duke of Atholl*, 5 Dow, 282 (1817); Aff.

12. A decision respecting cruives and yairs does not form *res judicata* in a question as to stake-nets in the same place. — *Murray v. Earl of Selkirk*, 2 S. Ap. 299 (1824); Rev. 1 S. 106.

13. Circumstances in which held that the line between the estuary of the Tay and the sea had not been fixed, and therefore there had been no breach of interdict in erecting stake-nets within the estuary. — *Dalglish v. Duke of Athole*, 1 W. & S. 590 (1825); Rev. 2 S. 442.

14. Stake-nets in the sea-coast are not illegal. The proprietors of river fishings have no title to object to the proprietors of sea fishings using stake-nets, although their grant from the Crown is only for fishing by net and coble. Query, Whether the Crown could object. — *Earl of Kintore v. Forbes*, 3 W. & S. 261; 4 Bligh, N. S. 485 (1828); Aff. 4 S. 641.

15. Yairs in rivers being illegal by statute, neither the Crown nor a private individual can grant the right of erecting them. Question, Whether Loch Beaully is sea or river. — *Duff v. Fraser*, 5 W. & S. 57 (1831); Aff. 8 S. 14.

16. It is an incorrect ruling by the Judge that "it is the absence or prevalence of fresh water, though strongly impregnated by salt," that determines the legality or illegality of stake-nets, for the phrase would be understood by the jury as meaning the presence or absence of fresh water, which is an incorrect test. A new trial, therefore, directed. — *Horne v. Mackenzie*, M'L. & R. 977; 6 Cl. & Fin. 628 (1839); Rev. 16 S. 1286.

17. The line at which an estuary enters the sea is not necessarily the line to which the tide recedes when at its lowest ebb, but is to be determined in each case on a view of the whole facts. — *Ross v. Duke of Sutherland*, 3 S. Bell, 315 (1844); Aff. 6 D. 425.

18. Bermoney fishing, *i. e.*, by means of a boat hauled along a rope secured to a stake or anchor in the bed of the river, is not illegal. (Per Lord Westbury)—The main rule is, that the net must be held in

the fisherman's hand, and kept in motion during the period of fishing. Injury to navigation cannot be considered in an action for trying the legality of a mode of fishing under the Acts. — *Hay v. Mags. of Perth*, 4 M'Q. 535 (1863); Rev. 24 D. 230.

See ACTION, 30, 110.

II. EXTENT OF GRANT.

19. Declaration of boundaries of right between two neighbouring proprietors. — *Duke of Gordon v. Earl of Murray*, Cr. & St. 8 (1728).

20. Where the Crown grants a right of fishing round an island to one, and from the bank to another, and the channel is too narrow to allow both fishings to be used simultaneously, they must be used alternately. — *Lord Gray v. Mags. of Perth*, Cr. & St. 645 (1757); Rev.

21. Where by two charters, the one a bounding, the other, and prior, containing a general grant of fishings pertinent to the lands, conflicting rights had been given, prescription on the general grant may avail to exclude in part the right conferred by the bounding charter. — *Littlejohn v. Straton*, 2 P. 19 (1759); Aff.

22. The boundary between the right of fishing of two conterminous proprietors being fixed by the House of Lords in principle, the Court of Session may order the sheriffs of the two counties which the river divides to place proper marks on the banks to show the boundary. — *Duke of Gordon v. Earl of Moray*, 2 P. 78 (1763); Aff.

23. The boundaries of several claimants to salt and fresh water fishings settled by evidence and marked on a plan. — *Dunbar v. Brodie*, 6 P. 769, 775 (1765-9); Aff.

24. Clause "*cum piscationibus*" held sufficient to carry salmon fishings if attended with proof of immemorial possession. Remit to consider interdict of operations on a quay said to be injurious to another party's salmon fishings. — *Berry v. Stewart*, 6 P. 102 (1815); Alt. *See* 29.

25. The salmon fishing in a river, the right to which belonged to the heritors on the opposite banks, having been let for a series of years to one tenant, he is entitled to the benefit of a possessory judgment as to the right of drawing his nets, even after the fishing on the side on which he draws them has been let to another tenant. — *M'Kenzie v. Sutherland*, 2 W. & S. 158 (1826); Aff. 4 S. 230.

26. A party who has right to certain salmon fishings has no title to object to another fishing in a place where the pursuer has no right, seeing that if the right is not in the defender, it is in the Crown. — *Mackenzie v. Houston*, 5 W. & S. 422 (1831); Aff. 8 S. 117.

27. The salmon fishings in a river, together with the property of the

river, may be granted to a party who has no property in the banks ; but in such a case, the proprietor of the banks is entitled to fish trouts with trout rods, but not with net and coble, or in any way that may injure the salmon fishings. — *Mackenzie v. Rose*, 6 W. & S. 31 (1832) ; Aff. 8 S. 816.

28. The line of division between two grants of fishing, remitted to be marked by a surveyor on a plan, which was then signed by the Lord President. — *Mags. of Dingwall v. Mackenzie*, 7 W. & S. 306 (1834) ; Aff. 7 S. 383.

29. A grant of lands *cum earund. piscationibus*, followed by usage of fishing cairn-nets, is a good title to salmon fishing, even on water not opposite the lands. — *Duke of Roxburgh v. Ramsay*, 7 S. Bell, 248 (1850) ; Aff. 10 D. 661. See 24.

30. The salmon fishings around the coast of Scotland, and in the navigable estuaries, bays, and rivers, belong to the Crown as part of the hereditary revenue, and are not granted by mere erection of a barony. — *Gammell v. Comrs. of Woods and Forests*, 3 M.Q. 419 (1859) ; Aff. 13 D. 854.

See LANDLORD AND TENANT, 7.

III. RIGHTS OF GRANTEES.

31. A statute imposing a penalty for preventing fish from ascending a river, supports an action for the purpose of having the obstruction removed. Preamble does not limit enactment. — *Earl of Home v. Duke of Roxburgh*, 2 P. 365 (1774) ; Aff.

32. The lower heritor having an exclusive right of salmon fishing in a river, the upper heritors are nevertheless entitled to have temporary openings made in any salmon cruives, to allow the passage of timber rafts, but only between sunrise and sunset, and under the direction of the parties in charge of the cruives. — *Grant v. Duke of Gordon*, 2 P. 582 (1782) ; 3 P. 679 ; Aff. M. 12820.

33. A retour and infeftment in salmon fishing in a river, with Crown charter not mentioning salmon, but granting fishings in the river in general words, is sufficient title to enable the heritor to sue an inferior heritor for obstructing the river. — *Johnstone v. Stotts*, 4 P. 274 (1801) ; Aff.

34. Mill-owners must use their right to dam back the water in such a way as not to injure the salmon fishing of upper heritors as anciently enjoyed, and must make any constructions necessary to prevent injury at their own expense. — *Viscount Arbuthnott v. Scott*, 4 P. 337 (1802) ; Rev. *Scott v. Gillies*, 5 P. 750 (1813) ; Aff.

35. A proprietor of the bank of a river, but not of the fishings, has

no right to embank his land so as to prevent fishing, further than is necessary for the protection of the land; but the proprietor of the fishings has no right to perform any operations on the bed of the river, of a nature to injure the adjoining land, although he had acquired a prescriptive right to do so on other parts of the river. — *Forbes v. Smyth*, 1 W. & S. 583 (1825); Aff. 2 S. 721. See 24.

See PROPERTY (*River*)—SERVITUDE (*Water*).

SANCTUARY.

The palace of Holyrood being in the Royal occupation, protects against a pointing of a private person's goods within it. Question, Whether the Sanctuary, beyond the limits of the Palace, protects the goods. — *Earl of Strathmore v. Laing*, 2 W. & S. 1 (1826); Rev. 2 S. 223.

See BANKRUPTCY, 16.

SCHOOL.

1. The Court of Session cannot, under the Acts 1693, c. 22, and 1696, c. 26, review the decision of the Presbytery in regard to the election and qualifications of a schoolmaster. Question, Whether appeal lies to the Synod and General Assembly. — *M'Culloch v. Allan*, 4 P. 119 (1800); Rev. M. 7471.

2. A master appointed by a private body of subscribers to a school incorporated, is not a public officer, and therefore may be dismissed without cause assigned. — *Gibson v. Ross*, 1 Robin. 16; 7 Cl. & Fin. 241 (1840); Aff. 16 S. 301.

3. A schoolmaster appointed by the directors of an academy originated by subscription, but in which the parish school has been merged, the appointment being *ad vitam aut culpam*, is not a parish schoolmaster, and may be removed by the directors on his refusing to give any explanation of a charge of malversation in another office, and on the directors finding the charge established. — *Weir v. Crawford*, 6 S. Bell, 112 (1847); Aff.

4. Trustees of a private school may, in the absence of express restraint, dismiss a teacher at pleasure. — *Bell v. Mylne*, 2 Robin. 286 (1841); Aff. 16 D. 115.

See BURGH, 3—COURT OF SESSION, 4—TRUST, 22.

SECURITY.

1. Share certificates being deposited in security of a loan, the lender is justified in paying further calls under a subsequent Act of Parliament, and these payments carry interest along with the original debt without express stipulation as to either, but credit must be given for dividends drawn. — *Cuming v. Pantoun*, Robert. 582 (1726); *Aff.*

2. Under a submission certain lands were conveyed in security of debt, and to be redeemable only within ten years, but (in the particular circumstances of the case, the debtor's allegation being that the creditor was so encumbered that he could not grant valid receipts) the lands were found to be redeemable after the lapse of the twenty years. — *Home v. Home*, Cr. & St. 260 (1739); *Rev.*

3. A sale of lands and feu-duties for twenty-one years for a fixed price, the price of the casualties during the term to be fixed by arbitration, and the lands, &c., to be redeemable thereafter, is a proper wadset, and might confer a sufficient freehold qualification for voting under the old law. — *Stirling v. Campbell*, Cr. & St. 583 (1754); *Aff. M.* 2439.

4. A heritable bond being granted to the acceptor of certain bills named in it, as security for his repayment, it subsists, after the bills are retired, to the extent to which he can prove them to have been retired with his funds, and payments made to him may be imputed to other debts so as to keep the bond in force. — *Bank of England v. Pulteney*, 3 P. 92 (1787); *Aff.*

5. A conveyance, in security for an indefinite sum, of a heritable bond for a definite sum, is void against creditors under the Act 1696, c. 5. — *Newnham v. Stewart*, 3 P. 345 (1794); *Aff. M.* 1158 and 1236.

6. The Act 1696, c. 5, does not apply to an absolute conveyance granted by a collector of taxes to his cautioners, on which infestment had followed, but without change of possession, and admittedly only for their relief and security. — *Fordyce v. Gordon*, 5 P. 165 (1807); *Aff.*

7. A heritable bond containing an obligation to infeft only *a me*, but an indefinite precept on which sasine is taken but no confirmation obtained, is to be postponed to subsequent securities duly feudalised. — *Stevenson v. Rowand*, 4 W. & S. 177; 2 Dow & Clark, 104 (1830); *Aff.* 3 S. 196. *See* Law Agent, 16.

8. An assignation *ex facie* absolute, qualified by back bond declaring it to be in security for existing debts, subsists as security for future debts also. — *Russell v. Earl of Breadalbane*, 5 W. & S. 256 (1831); *Aff.* 5 S. 891.

9. Circumstances held sufficient to establish that a disposition of a

long lease, valued at L.5000, for a much smaller sum, was in security only. — *Reid v. Lyon*, 6 W. & S. 114 (1832); Aff. 8 S. 789.

10. A creditor holding a decree of mailles and duties is in possession, although he allows a trustee for the general creditors to draw the rents. (Per Lord Wynford.) — *Ferrier v. Mowbray*, 7 W. & S. 147 (1834); 10 S. 773.

11. Existing incumbrances secured by infeftment may be assigned to a subsequent incumbrancer, and will give him a preference according to their dates, but if they are assigned to the owner of the estate, or a trustee for him, they are extinguished, and cannot afterwards be re-assigned by him. The burden of proving that a party through whose hands the assignation has passed was a trustee for the owner, lies on the creditors challenging the transaction. Interest paid prior to the assignation may be imputed to the new debt, so as not to diminish the extent of security afforded by the assignation. — *Mackenzie v. Orr*, M'L. & R. 117; 6 Cl. & Fin. 875 (1839); Aff. 16 S. 311. See Ranking and Sale, 5.

12. A party not validly infeft may grant bond under the 10 and 11 Vict. c. 50, operating as a conveyance of his personal right, and its registration will operate as intimation to the superior, so as to entitle the holder to require any subsequent charter to be granted under it as a real burden. — *Edmond v. Gordon*, 3 M'Q. 116 (1858); Aff. 18 D. 47.

See ADJUDICATION, 4—BANKRUPTCY, 5, 7, 52, 56—CAUTIONER, 22—DEBT—INTEREST, 8—INFESTMENT, 5—INHIBITION, 4—LANDLORD AND TENANT, 16—LAW AGENT, 13, 15, 21—LIFERENTER, 5, 8—MINOR, 14—PERSONAL CAPACITY, 14, 15.

SEQUESTRATION.—See BANKRUPTCY.

SEQUESTRATION OF REAL ESTATE.—See ACTION, 1—ADJUDICATION, 5—APPEAL, 17—HEIRS, 54, 65—LEGITIMACY, 4—TRUST, 26, 51.

SERVITUDE.

I. AS TO WATER,	p. 296	III. RURAL,	p. 29
II. URBAN,	297	IV. COMMONTY,	29

SERVITUDE OF WAY—See WAY.

I. AS TO WATER.

1. Infeftment in a mill, with parts and pertinents, is sufficient to support a servitude of aqueduct established by prescription, and the dominant owner may keep the aqueduct and weirs supplying it in

order, and prevent any alterations by the owner of the servient tenement which would diminish the supply of water, except in so far as necessary to prevent flooding of the fields. — *Pringle v. Duke of Roxburgh*, 2 P. 134 (1767); *Aff.* See *Salmon Fishing*, 32, 34, 35.

2. A servitude of bleaching clothes is legal, and such a servitude, as well as that of taking water for drinking and washing from wells, and a right of way thereto, may be acquired by purchase, or by prescription, by a burgh, as a body corporate, for behoof of its burgesses and inhabitants. — *St Clair v. Mags. of Dysart*, 2 P. 554 (1780); *Aff. M.* 14519.

3. A party claiming right to use the water of a medicinal well may have a possessory judgment in his favour in the course of an application to the Sheriff for the erection of a march dyke, but cannot have a declaration of a servitude without a declarator. — *Waddell v. Russell*, 2 P. 579 (1781); *Aff.* See *Sheriff*, 4.

4. A stream being used to some extent as the sewer of a town, and a distillery being erected, which poured a considerable amount of refuse into it, remit to consider whether the inferior heritors are entitled to object to such distillery sewage. — *Jamieson v. Russel*, 3 P. 403 (1792); *Rem.*

5. The right on the part of the public to a towing path on both banks of the Carron, with mooring posts, held to be established by prescriptive usage, with the exception of one part as to which there had been interruption, and held that in law such right does not impose on the users any liability to keep in repair the river banks or sea-dykes used for the path, or to pay for damage occasioned by such use. — *Carron Co. v. Ogilvie*, 5 P. 61 (1805); *Alt.*

6. A water company having undertaken to relieve the corporation of all its obligations respecting the supply of water, held that possession of a supply for nearly a hundred years from the corporation, resting on a minute of grant, but which by a subsequent minute was explained to be during pleasure, does not constitute an obligation nor found a servitude. — *Edinburgh Water Co. v. Waugh*, 2 S. & M'L. 530 (1837); *Rev.* 13 S. 584.

7. When the owner of two adjoining tenements sells one "as presently possessed," he sells it with an implied title to all existing conveniences of drainage, &c., through the other. — *Ewart v. Cochrane*, 4 M'Q. 117 (1861); *Aff.* 22 D. 358.

See *SALMON FISHING*, 32, 34, 35—*SUPERIOR AND VASSAL*, 11.

II. URBAN.

8. Two contiguous plots of ground being disposed to different purchasers, with a proviso that the purchaser of one of them should be

restricted from erecting buildings on a certain area, which should be in all time "mean property for the preservation of light," this does not give the purchaser of the other plot any right to use it for other purposes, but he is not bound to prevent the rain-drop on it from his house. — *Baird v. Ross*, 6 W. & S. 127 (1832); *Alt.* 7 S. 766. See Appeal, 19.

9. A servitude *ne altius tollendi*, and of not building other buildings than coach-houses and stables, granted to the owners of two neighbouring tenements in a town, and registered in their titles, is not personal to them, but is for the benefit of singular successors, and is not lost by not being inserted for forty years in the titles of the servient tenement, nor by one of the coach-houses being suffered to be used as a painter's shop. — *Inglis v. Boswall*, 6 S. Bell, 427 (1849); *Aff.*

See SUPERIOR AND VASSAL, 22—WRITTEN DOCUMENT, 13.

III. RURAL.

10. Prescriptive possession of right to cut sea-ware without written title in Orkney sustained, though the lands were separated from the sea by a common. — *Richan v. Stove*, 6 P. 146 (1816); *Aff.* See Property, 3, 8.

11. Held, on construing a contract granting a right of cutting peat, that "fires" was used in the same sense as "families," and that the right of way was for carts as well as horses. — *Dingwall v. Farquharson*, 3 P. 564 (1797); *Aff.*

12. A servitude to take sand and gravel generally cannot be founded on prescription; prescription will only support a servitude limited to the use of the dominant tenement. — *Duke of Hamilton v. Aikman*, 6 W. & S. 64 (1832); *Alt.* 8 S. 943.

13. Remit to consider whether those having a right to play at golf on the St Andrews Links were entitled to destroy or prevent the keeping of rabbits, as being alleged to be detrimental to the links for the purpose of golf. Question, Whether such a right could be stated as not merely in the inhabitants of the town, but in all others. Question as to the competency of including a claim for damages at the instance of an individual in a declarator of such a right. — *Dempster v. Cleghorn*, 2 Dow, 40 (1813); *Rem. M.* 16141.

14. There can be no public right of pasturage or of resting-places for cattle travelling along a drove road. — *Marquis of Breadalbane v. McGregor*, 7 S. Bell, 43 (1848); *Rev.* 9 D. 210.

15. A right of walking at large for recreation over a piece of ground cannot be acquired by prescription, though it may be by grant. — *Dyce v. Lady James Hay*, 1 M'Q. 305; 1 Stu. 783 (1852); *Aff.* 11 D. 1266.

16. The weight of evidence of use to establish a servitude depends

on how far the acts done were constant, known to the opposite party, and likely to be disputed, if not matter of right. (Per Lord Cranworth.) — *Sawers v. Russell*, 2 M^cQ. 76 (1855); Aff.

See ACTION, 29—BURGH, 2—PROPERTY, 3, 8.

IV. COMMONTY.

17. Exercise for forty years of a privilege of commonty by tenants gives right to a share of the moor on division, though it is alleged that they exercised the right only by license of their landlord, who held a separate wadset of the moor subject to the servitudes of other heritors. *Trotter v. Earl of Marchmont*, Cr. & St. 186 (1736); Rev.

18. A right of servitude of pasturage, reserved by a decree-arbitral, held to have been lost by a subsequent agreement for building a march dyke. — *Rutherford v. Stormonth*, 4 P. 515 (1803); Aff.

19. Evidence of having forty years before ploughed up a piece of ground subsequently dealt with as part of a common, is not sufficient to raise a presumption of ownership. Observed that evidence on which the Court proceeds in such cases will not easily be held insufficient in the House of Lords. — *Watt v. Paterson*, 2 Dow, 25 (1813); Aff.

20. Objections to the Sheriff's procedure in a process of division repelled. — *Robertson v. Duke of Atholl*, 6 P. 137 (1815); Aff.

21. Special case on titles and possession. — *Innes v. Keith*, 2 S. Ap. 146 (1824); Aff.

22. Opinion that a grant of commonty of pasturage does not warrant a usage of taking stones from the common. — *Stonehaven Harbour Trs. v. Keith*, 5 W. & S. 234 (1831); Aff. 7 S. 405.

23. A party claiming a right of servitude over a piece of ground may bring a declarator that he has a right of way to it over the intervening land, or that the intervening land is common property; and may also plead that the party against whom the action is brought has no right of property in the ground over which the servitude is claimed. — *Duke of Hamilton v. Aikman*, 6 W. & S. 64 (1832); Aff. 8 S. 943.

24. A feu-disposition of plots of land for building, "with a proportional part of the water-side grass opposite," which is to be common property to all the vassals," conveys the solum to them in commonty, and not merely the grass upon it. — *Logan v. Wright*, 5 W. & S. 242 (1831); Aff. 8 S. 247.

See GAME—PARISH, 18, 24—PROPERTY, 11, 12, 14.

SHERIFF.

I. JURISDICTION, . . . p. 300 | II. ADVOCATION FROM, . . . p. 301

I. JURISDICTION.

1. An action for L.8, as the value of an ox alleged to have strayed, and taken possession of by the Sheriff-depute of the county in virtue of his office, sustained in the Court of Session, and on proof L.3 decreed to be paid to the owner. — *Napier v. M'Farlane*, 3 P. 649 (1749); *Aff.*

2. A summons in the Sheriff-court may be signed by a party holding authority from the sheriff-clerk, and if signed on the last page is sufficient, and citation by a messenger-at-arms, not a sheriff-officer, is valid. — *Finlayson v. Innes*, 4 P. 443 (1803); *Aff.*

3. The Incorporated Society of Solicitors before the Sheriff-courts of Edinburgh have exclusive privilege of being heard before the Sheriff-courts in Edinburgh, but not in a new Sheriff-court in Leith. — *Soc. of Sols. v. Smillie*, 4 W. & S. 370 (1830); *Aff.*

4. In an application to the Sheriff for interdict against an alleged trespass, a defence of right of way cannot be entertained unless founded on express grant or declarator, but a possessory judgment for the defenders may be given founded on seven years' possession. — *Weir v. Glenny*, 7 W. & S. 244 (1834); *Rev.* 10 S. 290. *See* Servitude, 3.

5. The Sheriff has power at common law to issue warrant of open doors for the execution of a poinding, and may exercise it on a small-debt decree, although not expressly empowered by the Act. The return of the messenger praying for such warrant need not be signed by witnesses. — *Scott v. Letham*, 5 S. Bell, 126 (1846); *Aff.* 6 D. 1221.

6. Complaint does not lie against a Sheriff for acting as procurator unless the concurrence of the Lord Advocate is obtained. Observed, that the practice of appointing a procurator of the Court to act as Sheriff-substitute, in absence of the regular substitute, is reprehensible. — *Mackintosh v. Mackenzie*, 1 Bligh, 272 (1819); *Aff.* F. C. 18th Nov. 1818.

7. No action lies against a Sheriff, without allegation of express malice, for suspending a practitioner in his Court for contempt, in refusing to obey an order to expunge matter from a pleading which the Sheriff considered scandalous. Such order and punishment are competent. — *Hamilton v. Anderson*, 3 M'Q. 363 (1858); *Aff.* 18 D. 1003.

8. Observed that the Sheriff-court in Scotland is one of the Superior Courts, but not a Court of Record. (Per Lord Cranworth.) — *Hamilton v. Anderson*, 3 M'Q. 363 (1858); 18 D. 1003.

See COURT OF SESSION, 6—LANDLORD AND TENANT, 10—PUBLIC WORKS, 8—SERVITUDE, 3, 7.

II. ADVOCATION FROM.

9. An advocation *ob contingentiam* of a declarator is competent after the summons of declarator has been executed, though not yet called. The House having affirmed a judgment advocating a cause, sustaining the reasons of advocation, and assoilzieing the defender, but ordered the case to be remitted to the Sheriff to proceed in terms of his interlocutor, by which decree was given against the defender, the meaning of this was considered by the Court in 6 S. 85. — *M'Donell v. Cameron*, 2 W. & S. 595 (1827); Alt. 3 S. 341.

10. A party having succeeded in passing a bill of advocation *ob contingentiam* without caution, and without either intimation or laying the inferior Court process before the Lord Ordinary, the Court may, on petition, recall the letters expedite. — *Brown v. Bogle*, 1 W. & S. 318 (1825); Aff. 2 S. 641.

11. In an advocation in which the decree of the inferior Court is altered by the Lord Ordinary, to whose judgment the Inner House adheres, the Court ought not to find the respondent liable in expenses in the Court of Session, where he supports the decision of the inferior Court, but may give the expenses which, according to their judgment, the inferior Court ought to have given. And the House of Lords, having reversed the judgment of the Court of Session, gave to the respondent in the advocation his expenses in the inferior Court and in the Court of Session up to the date of the Lord Ordinary's judgment, but left each party to bear his own expenses in the Inner House and House of Lords. — *Robertson v. Harford*, 6 W. & S. 1 (1832); Rev. 9 S. 352.

12. A. brought an action against B. in the Sheriff-court; B. advocated on a question as to the manner of proof, and the Lord Ordinary partly concurred in his arguments, and remitted to the Sheriff to proceed accordingly; on the merits the Sheriff decerned in favour of A., but on advocation the Lord Ordinary altered and assoilzied B., while the Court again altered and remitted to the Sheriff *simpliciter*; and the House, on appeal, reversed this decision, and gave final judgment in favour of B. The House directed that B. should pay none of the costs of the first advocation, but receive costs so far as he had been successful in it, while paying, however, the costs of the other proceedings before the Sheriff. In regard to the second advocation, and reclaiming to the Inner House and appeal, neither party was allowed costs. — *Catterns v. Tennent*, 1 S. & M'L. 694 (1835); Rev. 12 S. 686.

13. When the defender in an action in the Sheriff-court was assoilzied on certain defences, but others which he had proponed were repelled, and the pursuer advocated, the defender is entitled to plead

in regard to the defences which were repelled, although he has not advocated. — *Cunningham v. Dod's Trustee*, 2 S. & M'L. 984 (1837); Aff. 12 S. 678.

14. Letters of advocacy not being expedite within ten days of lodging the bill of advocacy, and a certificate of the fact being obtained, the advocacy falls to the ground, though the process has been lodged in Court. — *Scott v. Curle*, 2 Robin. 317 (1841); Aff. 2 D. 348.

15. When a process is borrowed in the Sheriff-court, it ought to be returned there, and it is no defence against a process caption that it has been lodged in the Court of Session on an advocacy. — *Scott v. Curle*, 2 Robin. 317 (1841); Aff. 2 D. 348.

16. A defender may apply by petition in the Sheriff-court to have parties liable in relief to him made parties to the action against him; but if this is improperly done, the original pursuer may advocate on the ground of "incompetency." — *Wishart v. Wylie*, 2 St. H. L. 68 (1853); Aff. 13 D. 1100.

SHIPPING.

1. Freight is due in full on goods wrecked, in so far as taken possession of by the owners, though abandoned afterwards to the insurers, provided the shipowner offers to convey them to the port of delivery; and freight *pro rata itineris* is due on such goods as are taken possession of by the freighter, on the owners refusing to forward them, however seriously damaged they may turn out to be. — *Lutwidge v. Gray, Cr. & St.* 119 (1734); *Rev. M.* 10111.

2. There is no hypothec or right of bottomry for repairs on a ship in a home port. — *Wood v. Hamilton*, 3 P. 148 (1789); *Aff. M.* 6269.

3. Demurrage is not due after a vessel has actually sailed, though driven back by stress of weather two days after, and then frozen in for the winter. Such a question is one to be decided on principles of law, and not by the custom of merchants. (Per Lord Loughborough.) — *Jamieson v. Laurie*, 3 P. 493; 6 Br. P. C. 474 (1796); *Rev.*

4. A purchaser of goods having, after communication with the vendor, freighted a ship to carry them, the vendor is liable for demurrage if the goods are not ready. Reasons given on affirmance, the opinion of the Lords, as individuals, being against those of the Court below, but without sufficient grounds to say so judicially. — *Haig v. Hannay*, 1 Dow, 259 (1813); *Aff.*

5. Repairs on a ship owned at Greenock were done by the order of the master at Hull, after communication with the owner's agents there;

the agents charged the amount to the owner, and were paid, but did not pay the workmen employed. On the agents falling into difficulties nine months after the work was done, the workmen applied to the owner. Held that he was personally liable for the master's orders, and that he had not been discharged by the delay. — *Stewart v. Hall*, 2 Dow, 29 (1813); *Aff.*

6. A ship's husband has not implied authority to direct an appeal to be taken in a lawsuit affecting the ship, and his statement in writing that he was directed by the owner is not evidence to make the owner liable after prescription has run. When the name of each of two individuals appears in separate entries in the register as sole owner, it is impossible to treat them as co-owners. — *Campbell v. Stein*, 6 Dow, 117 (1818); *Aff.*

7. The 26 Geo. III. c. 86, exempting vessels from liability for loss by fire, applies only to sea-going vessels and not to lighters in a river or estuary. — *Hunter v. M'Gown*, 6 P. 460; 1 *Bligh*, 573 (1819); *Rev. F. C.* 16th May 1811.

8. The agents of the freighters having at a foreign port taken upon themselves to alter the further destination of the ship from that specified in her charter-party, the master consenting thereto, and intimating the same to the owners, who thereupon attempted to effect a new insurance, but failed through news arriving of the loss of the ship, the owners are not entitled to call upon the freighters, after a lapse of two months, for the value of the ship. Questions as to freight were, however, reserved. — *Russell v. Shannon*, 1 S. Ap. 83 (1821); *Rev.*

9. An agreement respecting the sale of a ship by the trustee in bankruptcy, is not liable to stamp-duty, as being in *re mercatoria*. — *Jeffrey v. Brown*, 2 S. Ap. 349 (1824); *Aff.* 1 S. 102.

10. If one ship runs down another, both being in fault, the loss of half the amount must be paid by the owners of the ship and cargo that is saved, to the extent at least of the value of the ship and cargo saved. — *Hay v. Le Neve*, 2 S. Ap. 395 (1824); *Rev.* 1 S. 378.

11. Damages are due for loss of voyage from defect in work, though the precise defects were not fully discovered for seven years, causing delay for repairs. — *Strachan v. Paton*, 3 W. & S. 19; 3 *Bligh*, N. S. 350 (1825); *Aff.* 3 S. 259.

12. A registered owner of a ship at Leith is liable for furnishings made to her by the master's order in London, although he alleged that the master was the true owner. — *Leslie v. Curtis*, 3 S. & M'L. 230 (1838); *Aff.* 14 S. 994.

See ADMIRALTY—BELLIGERENT—INSURANCE, MARINE—PRINCIPAL AND AGENT, 5—TRUST, 9—WRITTEN DOCUMENT, 5.

STAMP.

1. Question, Whether a deposit-receipt by a bank needs a stamp, and whether it can be stamped in the House of Lords. — *Bank of Scotland v. Watson*, 5 P. 655 and 1 Dow, 40 (1813).

2. An entry in the books of a corporation or partnership, granting a right to a well in their property, is inadmissible either as an agreement or evidence of an agreement unless stamped, and cannot be made the foundation for a demand to have a stamped agreement executed. — *Brown v. Murdoch*, 6 P. 94 (1815); *Rev.*

3. Query, Whether a receipt bearing to be for interest due at the present date, being on a stamp only sufficient for the current half-year's interest, could be considered in a question as to alleged prior arrears of interest. — *Duguid v. Mitchell*, 1 W. & S. 203 (1825); 3 S. 96; *Brown v. Murdoch (reported in note)*, 1 W. & S. 211 (1816).

4. An unstamped receipt is admissible to prove a fact collateral when the payment of the money to which the receipt refers is not a question put in issue. Observed that this rule will reconcile nearly all, but not all the cases. — *Matheson v. Ross*, 6 S. Bell, 374; 2 H. L. Ca. 286 (1849); *Rev.* 9 D. 1366.

See ASSIGNATION, 8—BANKRUPTCY, 25, 29—BILL OF EXCHANGE, 13—
LANDLORD AND TENANT, 32—LIFERENTER, 8—SHIPPING, 9.

STATUTE.

I. GENERAL RULES OF INTER-	II. PENAL STATUTES, . . . p. 306
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I. GENERAL RULES OF INTERPRETATION.

1. An indemnity statute cannot be extended to an offence not specified in it, and so an Act relieving from penalties for running smuggled goods does not relieve from penalties for clandestinely landing goods on which a drawback for exportation had been paid. — *Grosset v. Ogilvy*, 2 P. 1 (1753); *Rev.* See Damages, 1.

2. A statute having generally repealed certain preceding statutes, and re-enacted their provisions in part, but declared that all exceptions, provisions, &c., “not expressly altered, repealed, changed, or controlled by this Act should continue in full force;” held that an exemption from duties conferred by the repealed Act was preserved by this clause, though not expressly re-enacted. — *Patrick v. Lord Advocate*, 3 P. 265; 5 Br. P. C. 534 (1792); *Rev.*

3. The rule of desuetude applied to statutes is a part of the law of Scotland. Statutes are interpreted and applied in Scotland much more liberally than in England. (Per Lord Eldon.)—*Johnstone v. Stotts*, 4 P. 274 (1801); *Aff.*

4. When a statute does not lay down a distinct rule, one ought not be rashly implied from what it has not said. (Per Lord Brougham.)—*Earl of Strathmore v. Strathmore Trs.*, 5 W. & S. 170 (1831).

5. Unless a statute provides expressly, or by plain implication, that an instrument shall be invalid unless its provisions are complied with, it is directory merely, and there is no nullity or invalidity consequent on its breach. (Per Lord Brougham.)—*Maxwell v. Stevenson*, 5 W. & S. 276 (1831).

6. Usage cannot alter the terms of a statute, if clear, but if the usage is contemporary and uniform it may raise up a certain construction of the statute, even though somewhat forced, and when proof of usage is carried back for a century, and there is no proof of prior contrary usage, it amounts to contemporary usage. (Per Lord Brougham.)—*Mags. v. Heritors of Dunbar*, 1 S. & M'L. 134; 3 Cl. & Fin. 335 (1835).

7. The inconvenience of a particular interpretation being great is a proper reason for adopting an interpretation, justified by the words, which would avoid that inconvenience.—*Risk v. Muir*, 5 S. Bell, 14 (1846); *Aff.* 6 D. 677.

8. Observed that the schedule of a statute is sometimes part of the statute and sometimes not, and when giving a form, the place and date need not be inserted exactly in the place prescribed in the schedule.—*Cleland v. Clason*, 7 S. Bell, 153 (1850); *Aff.* 11 D. 601.

9. A declaration of the illegality of a process in a certain locality implies its legality elsewhere. It is otherwise if the statute merely affixes a penalty to an act.—*Duke of Roxburgh v. Ramsay*, 7 S. Bell, 248 (1850); *Aff.* 10 D. 661.

10. A statute saving a prior statute, and an agreement on which it was founded, does not save or give validity to a condition contained in the agreement, but not included in the subsequent statute.—*Edinburgh and Glasgow Ry. Co. v. Stirling and Dunfermline Ry. Co.*, 2 Stu. H. L. 91 (1853); *Aff.*

11. When a statute is unambiguous in the enacting part, recourse cannot be had to the preamble to create an ambiguity.—*Murray v. Grant*, 1 M'Q. 178; 1 Stu. 1069 (1852); *Aff.* 12 D. 201. See Salmon Fishing, 31.

12. Observed that Courts will be slow to attribute a retrospective effect to a statute, if not clearly expressed. (Per Lord Cranworth.)—*Urquhart v. Urquhart*, 1 M'Q. 658 (1853).

13. The Legislature, in passing an Act for Scotland, must be supposed

to have used language in the sense which it has acquired through judicial decisions *in pari materiâ* in England. — *Edinburgh Water Co. v. Hay*, 1 M'Q. 682 (1853); *Aff.* 12 D. 1240.

14. When a statute applies to both England and Scotland, the language must be taken in its popular sense, and not in the technical sense of either country. (Per Lord Campbell.) — *Lord Saltoun v. Advocate-General*, 3 M'Q. 659 (1860); *Rev.*

See 20—HEIR AND EXECUTOR, 7—JUSTICES OF PEACE, 1—POOR-RATES, 5, 7—PUBLIC WORKS, 6, 10, 12—TRUST, 33.

II. PENAL STATUTES.

15. The Stat. 1 Geo. I. c. 42, enacted that if the several persons therein named should not surrender themselves to one of His Majesty's Justices of the Peace on or before 30th June 1716, they should from 13th November 1715 stand attainted, and the justice to whom any one surrendered was required to commit him to prison, and give notice thereof to the Secretary of State. Held that a surrender on 23d April 1716 to three persons acting as justices of the peace in furnishing provisions to the royal troops, under orders directed to them as such by the officers in command, which surrender was certified by the extrajudicial declarations of the said justices, was sufficient compliance with the statute, although the justices appear not to have held a commission as such, nor reported the surrender to the Secretary of State, and though it was alleged for the Crown that the party had not surrendered, but been captured in arms, and this allegation was supported by the evidence of his captors. — *Comrs. of Forf. Estates v. Mackenzie* (not reported), *Lords' Journals*, 13th Jan. 1720; and the *Appeal Cases*.

16. Under the above statute, held that a party was not relieved from the penalty by intimation before the day to the officer in command of the forces in the neighbourhood (and also a justice of the peace), that he had ordered a surrender of the arms of his men, and would personally render himself without any delay, the fact being that he never did render himself—it was alleged through illness—and died within two years. — *Comrs. of Forf. Estates v. Macdonald, Robert.* 307 (1720); *Rev.*

17. The attainder by statute of "Major-General Thomas Gordon, Laird of Auchintoull," did not apply to Major-General Alexander Gordon, the real Laird of Auchintoull. Ref. to opinion of English Judges. — *Comrs. of Forf. Estates v. Gordon, Robert.* 278; 8 Br. P. C. 254 (1 P. Will, 612) (1720); *Aff.* So the attainder of Alexander "Farquharson of Inveray," did not apply to Patrick Farquharson of Inveray. — *Comrs. of Forf. Estates v. Farquharson, Robert.* 340 (1721); *Aff.* But the attainder of "Wakinshaw of Scotstoun," was a suffi-

ciently accurate designation of Walkinshaw, who had succeeded to but was not infett in Scotstoun. — *Walkinshaw v. Lord Advocate*, Cr. & St. 197 (1737); *Aff. M.* 4723.

18. The title of Lord Pitsligo having been in frequent use in the family, although the letters patent conferred it under the style of Lord Forbes of Pitsligo, the former was a sufficient designation in an Act of attainder. — *Lord Advocate v. Lord Pitsligo*, Cr. & St. 482; 8 Br. P. C. 257 (1751); *Rev. Elchies v. Forfeiture*, Nos. 9 and 10.

19. The Stat. 19 Geo. II. c. 26, declared that the person named not surrendering himself before 12th July, should be held attainted from 18th April preceding. This provision did not render such party incapable of taking lands of which the descent opened to him in the interval, although on his not surrendering they became forfeited as from 18th April. — *Drummond v. Lord Advocate*, Cr. & St. 503 (1751); *Aff. M.* 4875.

20. The penalties for usury introduced in Scotland by the Stat. 12 Anne, c. 16, were affected by the limitation of actions for penalties under that statute then existing in England. — *Walker v. Allam*, 4 P. 303 (1802), and 2 Dow, 254 (1814); *Rem. M. Usury*, Ap. No. 1.

21. An action for restitution of penalties and losses incurred through seizure by an officer of Excise, sustained in the Court of Session, on the ground that the penalties were imposed, by the order of the justices, not on individuals but on a firm, and other reasons. Question, Whether the statute under which the seizure was made, being for preventing the trade of currier and tanner being carried on by the same person, was a revenue statute, or one for regulation of trade. — *Campbell v. Anderson*, 5 Dow, 412 (1817); *Aff. F. C.* 28th Feb, 1811.

22. A statute creating an offence having declared that a party convicted by a justice of the peace "shall or may" appeal to Quarter Sessions, and that no such proceeding shall be removed into the Court of Session, an appeal to the Court of Session instead of to Quarter Sessions is incompetent. — *Craigie v. Mill*, 2 W. & S. 642 (1827); *Aff.* 4 S. 447.

See ACTION, 27—FORFEITURE—MEMBER OF PARLIAMENT, 3—PAWN-BROKER.

III. SPECIAL CLAUSES.

23. A statute (28 Geo. II. c. 29) having given to the city of Glasgow a duty on all beer brewed, inbrought, vended, tapped, and sold within the city, the brewing immediately beyond its limits, and making an agreement with a party within it to sell the beer so brewed to the customers of the brewery, is an evasion of the statute, and subjects the

beer to the duty as much as if brewed in the city. — *Mags. of Glasgow v. Murdoch*, 2 P. 615 (1783); *Rev.*

24. The 26 Geo. III. c. 81, gave a bounty to decked vessels clearing out of a port, and proceeding upon the fishery and continuing to fish for three months. Held that it did not apply to a decked vessel clearing out of a port, but then remaining at anchor, while the crew carried on the fishing in boats, without making any use of the decked vessel. Opinion of English Judges. — *Edgar v. Miller*, 3 P. 575; 6 Br. P. C. 530 (1797); *Rev.*

25. The Statute 33 Geo. III. c. 61, enacted that for every day during which any licensed still should be used in making spirits from British materials, the owner should recover an abatement or allowance of two-tenths on every cubical gallon of the contents of the still. Held that such abatement was not due in respect of any working of the still on Sundays. Question, Whether an abatement can be construed so as to amount to a larger sum than the duty, so as to be in fact a bounty. — *Easton v. Brown*, 4 P. 39 (1798); *Aff.*

26. The local militia of the city of Edinburgh having volunteered to extend their service out of their county, under 54 Geo. III. c. 19, and in consequence served for forty-two days at Musselburgh, the men are entitled to the privileges of freemen in towns, as having been in actual service under 52 Geo. III. c. 68, § 179. — *Glass v. Hunter*, 1 S. Ap. 128 (1822); *Aff.*

27. Under a series of charters and statutes, lead ore exempted from duty under certain statutes, and found liable under others. — Lord Advocate *v. Earl of Hopetoun* (and Duke of Buccleuch), 2 W. & S. 644 (1827); *Aff.*

28. A clause in a police act authorising the commissioners to remove buildings incroaching upon or obstructing the lines of streets, does not authorise the removal of buildings not extending beyond the line of fronts, merely for the purpose of widening a narrow street. — *Newall v. Comrs. of Police of Dumfries*, 4 W. & S. 137 (1830); *Rev.* 6 S. 884.

29. The Statute 5 Geo. IV. c. 74, which directs imperial measures, or local measures reduced to imperial, alone to be used, applies only to contracts respecting goods, and does not apply to the grain rent reserved in a lease. — *Henry v. M'Ewan*, 7 W. & S. 411 (1834); *Aff.* 10 S. 572.

30. The keeping open a barber's shop on Sunday morning is not an act of necessity or mercy, and therefore is illegal under the Acts 1579, c. 70, and 1690, c. 21. An apprentice's indenture binding him to work on Sundays is void to that extent. — *Phillips v. Innes*, 2 S. & M'L. 465; 4 Cl. & Fin. 234 (1837); *Rev.* 13 S. 778.

See POOR-RATES, 3, 4, 5, 6.

SUCCESSION AND LEGACY DUTIES.

1. A British-born subject dying domiciled in a colony, where his will was made, had debts owing to him in England; these were collected by his executors, who out of the proceeds paid legacies in England. Held that such legacies were not liable to legacy duty, which attaches only to legacies paid out of funds belonging to one domiciled in Britain. Observed that probate duty is due on wills proved in England, irrespective of the testator's domicile. English Judges consulted. — *Thomson v. Advocate-General*, 4 *S. Bell*, 1; 12 *Cl. & Fin.* 1 (1845); *Rev.* 3 *D.* 1309.

2. An assignation by five sisters of their whole property to themselves jointly, and the survivors and last survivor, and the heirs of the survivor, without power of revocation, is a gift in conjunct liferent, with the fee to the survivor, and is an onerous and not a *mortis causa* deed, and the property is not subject to legacy duty on the death of one of the sisters. — *Brown v. Lord Advocate*, 1 *M'Q.* 79; 1 *Stu.* 1024 (1852); *Rev.*

See HERITABLE AND MOVEABLE, 14, 17, 18.

Entale 202.

SUCCESSION IN HERITAGE.—See HEIRS.

SUCCESSION IN MOVEABLES.

1. Domicile regulates the succession to the personal estate wherever situated. — *Bruce v. Bruce*, 3 *P.* 163 (1790); *Alt. M.* 4617. *Hog. v. Lashley*, 3 *P.* 247 (1792); *Aff. M.* 8193.

2. A contract being made between nearest of kin in Scotland before the death of a lunatic relative, providing that, in the event of the predecease of any of them, their children should take their respective share; held that the words being general, the contract applied on the lunatic being found to have been domiciled in England, so that the personal estate passed by the law of England. — *Graham v. Weir*, 4 *P.* 548 (1804); *Aff.*

3. A claim for a share of the father's personal estate by one of several children is not excluded or affected by an advance made to the child during life, in the shape of a disposition of a small piece of land, other advances in money having been made to the other children, nor by the father having, on the bankruptcy of the child, paid on his behalf a composition to his creditors, receiving in return an assignation to the bankrupt's estate, and discharging his own claims against the child on the footing of the same composition. — *Rae v. Newal*, 5 *P.* 127 (1806); *Aff.*

See CONQUEST, 1—EXECUTRY—HUSBAND AND WIFE, 60—LEGITIM.

SUPERIOR AND VASSAL.

I. GENERAL RIGHTS, . . . p. 310	III. CASUALTIES, p. 313
II. FEU-DUTIES AND CONDITIONS, 311	

I. GENERAL RIGHTS.

1. Under a succession of statutes certain lands, originally annexed to the Crown, had been exceptionally granted and confirmed to a subject. Held that his title was unimpeachable, at least at the instance of a vassal of his own, whose authors had acknowledged him and his predecessors for nearly a hundred years as their immediate superiors. — *Heriot's Hospital v. Hepburn*, Robert. 118 (1715); Rev. M. 7986.

2. A corporation cannot claim to be entered as an appriser, under the Act 1649, c. 36, but only to have such proper person entered as they may nominate, and till then must account for the rents as in non-entry. Costs in Court of Session and H. of L. given against the respondent on reversal. — *Hamilton v. University of Glasgow*, Robert. 172 (1716); Rev. M. 9296. See 31.

3. A charter from the Crown, declaring that the lands granted, formerly held of an abbey, should be held of it in the same manner as annexed kirk lands, does not prevent the Crown from granting the superiority to another party. — *Coltart v. Maxwell*, 2 P. 482 (1779); Aff.

4. Damages being claimed from the heirs of a superior, and of his agent, for granting a precept of clare after the superiority had been sold, whereby a bad title was made up, and it was afterwards reduced, the object of taking the precept by the vassal being to defeat an entail, to which the defences were pleaded that such object laid the party open to the objection of *versans in illicito*, and that a penal action did not transmit against heirs. The defences were sustained. — *Syme v. Erskine*, 4 P. 510 (1803); Aff. M. Superior and Vassal, Ap. No. 3. See Fraud, 6.

5. A lease of lands for bleaching works being granted, with privilege of taking in water from a river by a canal, &c., and the lessees having subsequently entered into an agreement for a feu of the lands, "with all the rights, privileges, &c., thereto belonging;" held that they were not entitled to insist on the feu-charter containing an express grant of the water privilege, it being included in the general words, if the heritor could competently grant it. — *Paton v. Brebner*, 1 Bligh, 42 (1819); Rev.

6. Charters granted by a common agent, as in implement of a prior contract, and containing a feu-right of grazing, reduced as regards such right, on evidence that the contract was only for a lease of the grazings. — *Bayne v. Campbell*, 6 P. 104 (1815); Aff.

7. A superior who has included two separate feus in one charter is

not barred from afterwards selling the superiorities to different individuals. — *Duke of Argyll v. Lamont*, 6 P. 410 (1819); *Rev. F. C.* 23d June 1813.

8. Lands originally belonging to New Abbey being granted to a subject, and resumed on the establishment of Episcopacy, but by Act 1695 excepted from the annexation clause of the Act 1690, and several times regranted by Crown charter to the heirs of the original grantee, held to be vested in him, but a vassal held not to be liable in non-entry duties, except from the commencement of the action. — *Spottiswoode v. Burnett*, 6 P. 747 (1763); *Rev.*

9. A vassal held entitled to object to the multiplication of superiors by the granting of liferent infeftments for the making of votes. — *Duke of Montrose v. Colquhoun*, 6 P. 805 (1782); *Aff. M.* 8822.

10. A party contracting to have a feu-right granted him cannot afterwards compel the superior to grant the charter to another party already indebted to the superior, for whom he alleges he contracted as trustee, the superior not having notice of such a trust at the time of the contract. — *Campbell v. Steele*, 2 W. & S. 334 (1826); *Rev.* 3 S. 60.

11. A superior having constructed a drain for the houses built on his feus, and allowed other drainage to pass into it, he is liable for damage done by storm overflow on a lower tenement. — *Mags. of Edinburgh v. Dickson*, 4 W. & S. 1 (1830); *Aff.* 5 S. 94.

12. A superior may grant precept of clare to himself in the *dominium utile*, without establishing his propinquity otherwise, if it in fact exists. — *Craig v. Cochrane*, 2 Robin. 446 (1841); *Aff.* 16 S. 1332.

13. The superior having acquired and possessed without infeftment the *dominium utile* for more than forty years, it is *ipso jure* consolidated with the superiority, and is not afterwards separated by the superior taking infeftment in the property, and granting himself a charter of confirmation. — *Graham v. Bontine*, 1 Robin. 347 (1840); *Aff.* 15 S. 711.

14. The title made up by a vassal, who has charged all the alleged superiors to enter, cannot be affected by a flaw in the title of the superior who does enter, and by whom the vassal's title is completed. — *Craig v. Cochrane*, 2 Robin. 446 (1841); *Aff.* 16 S. 1332.

See PROPERTY, 24, 25, 26.

II. FEU-DUTIES AND CONDITIONS.

15. A vassal in kirk lands, who had advanced money to the Crown on condition of holding of it in future, but always paying to it the usual feu-duties, is not entitled to withhold the feu-duties for his repayment on Parliament vesting the superiority in a lord of erection. — *Farquhar v. Earl of Loudoun*, Robert. 303 (1720); *Aff.*

16. A general clause of reference in a sasine to the conditions and provisions in the charter particularly mentioned, the charter being specified by its date and the name of the grantor, is sufficient to secure to the superior, as against creditors and singular successors, all the conditions and provisions in the charter. — *Duke of Argyle v. Earl of Breadalbane* (1732); Cr. & St. 84; Rev. M. 10306.

17. A clause of return in favour of the superior is effectually discharged by his granting a charter without the clause, and even if the superiority is conveyed to another, a charter by the new superior without the clause will, after possession for forty years, extinguish the original superior's claim. — *Douglas v. Douglas*, Cr. & St. 553 (1754); *Aff. Elchies v. Provision to Heirs*, No. 19.

18. A condition that a vassal should not dig for stones, coal, sand, &c., nor use the lands in any other way than by the ordinary labour of the plough and spade, does not prevent his erecting buildings to any extent. — *Heriot's Hospital v. Ferguson*, 3 P. 674 (1774); *Aff. M.* 12817.

19. An exemption in a feu-charter of all public burdens or impositions imposed, or to be imposed, includes land tax, stipend, and school-master's salaries, but not the rebuilding or repair of churches and manses. — *Greig v. Carstairs*, 3 P. 675 (1775); *Aff. M.* 2333.

20. An original charter contained a *reddendo* of thirty bolls of corn, convertible at 6s. 8d. Scots, at the option of the vassal; held that the right to convert it at that rate was not lost by usage of delivering the *ipsa corpora* for ninety years. — *Macleod v. Ross*, 2 P. 430 (1777); *Aff. 5 Br. Sup.* 615.

21. Remit to consider whether it is competent to impose, as a condition of a feu, that all conveyances, &c., shall be prepared by the superior's law agent. — *Harley v. Campbell*, 1 W. & S. 690 (1825); 2 S. 341. *See Real Burden.* 7.

22. A vassal is not entitled to retain the feu-duty on the ground that a condition *altius non tollendi* contained in the charters granted by the superior to other parties has been infringed, his remedy against the superior, if he has been deceived by misrepresentation, being by action for damages only. — *Heriot's Hospital v. Cockburn*, 2 W. & S. 293 (1826); Rev. 4 S. 128.

23. In a charter there being a clause binding the feuar to relieve the superior of all multures, and the feu-duty being then declared to be "for all other burden, exaction, question, demand, or secular service, which can any ways be exacted or demanded," and the superior having always paid the stipend, he is bound to do so. — *Heriot's Hospital v. M'Donald*, 4 W. & S. 98 (1830); *Aff. 9 S. Teind Ca.* 156.

24. The purchaser of land binding himself personally to pay a

ground annual (whether with or without sureties, and whether infeft or not), does not free himself from the obligation by conveying the land, and the purchaser does not become liable, unless he actually undertakes the liability. — *Millar v. Small*, 1 M'Q. 345; 2 Stu. H. L. 60 (1853); *Rev.* 11 D. 495. *Royal Bank v. Gardyne*, 1 M'Q. 358, 2 Stu. H. L. 81 (1853); *Rev.* 13 D. 912.

25. A personal bond for payment of feu-duty by the vassal, his heirs and successors, is not avoided on a conveyance of the land to a purchaser, although the obligation is also inserted in the feu-charter. — *King's College Aberdeen v. Lady James Hay*, 1 M'Q. 526 (1853); *Rev.* 14 D. 675.

26. An obligation in a feu contract, binding the vassal to maintain and uphold a mill in good working order, and to insure it against fire, will bind him or a singular successor to rebuild it if burned down. — *Clark v. Glasgow Ass. Co.*, 1 M'Q. 668 (1853); *Rev.* 12 D. 1047.

27. On a sale of land by auction, under condition that the purchaser should grant bond for the feu-duty, binding himself and all the succeeding heirs and singular successors in the premises, the purchaser actually bound himself, his heirs, executors, and successors whomsoever. Held that he remained personally liable for the feu-duty, even after selling the land; but without prejudice to an action for setting aside the bond granted as beyond the stipulations in the conditions of sale. — *Elmsley v. Brown*, 2 M'Q. 40 (1855); *Rev.*

See BANKRUPTCY, 64—LIFERENTER, 3, 9—RANKING AND SALE, 1.

III. CASUALTIES.

28. A claim of forfeiture on the ground of recognition being stated but not pressed, along with a claim for forfeiture on the ground of treason, under the Statutes 1 Geo. I. c. 20 and c. 50, 5 Geo. I. c. 20, on which last decree was obtained, the former claim cannot be set up by the superior in a subsequent action. — *Earl of Sutherland v. Ross*, Cr. & St. 351 (1743); *Alt. Elchies v. Forfeiture*, No. 3.

29. Where it is uncertain in whom the right of superiority is vested during a term of years, the retoured duties cannot be claimed from the vassals in non-entry during that period. — *Chalmers v. Alison*, Cr. & St. 404 (1746); *Alt. M.* 9330. See 8.

30. When the title to the superiority is doubtful, the retour duties only will be allowed during non-entry. — *Coltart v. Maxwell*, 2 P. 482 (1779); *Aff.*

31. A disponee of a feuar, not restrained from sub-feuing, is entitled to an entry on payment of only one year's sub-feu duties and casualties, and is not liable to pay a sum equal to the rents drawn by sub-feuars

from houses they had erected on the ground. — *Heriot's Hospital v. Ross*, 6 P. 640 ; 2 Bligh, 707 (1820) ; Aff. F. C. 6th June 1816.

32. A superior is not entitled to the composition payable by singular successors on entering heirs called by an entail who are not of line, or even related to the heir last seized, and a reservation in the first charter of his right under any claim he might have at law does not affect the question, as he has no right at law. — *Stirling v. Ewart (Allershaw)*, 3 S. Bell, 128 (1844) ; Aff. 4 D. 684. See 2.

See *LIFERENTER*, 9.

TEINDS.

I. RIGHT TO,	p. 314	III. LOCALITY,	p. 315
II. VALUATION,	314	IV. RELIEF AGAINST AUGMENTA- TIONS,	316

I. RIGHT TO.

1. A prerogation of a tack of teinds, on occasion of an augmentation, for six nineteen years, reduced to one nineteen years on appeal by the patron against a decree of 1698, and another of 1708, though an intermediate decree in 1707, confirming the first, was not appealed from. — *Durham v. Lundine, Robert*. 16 (1711) ; Rev. 1708.

2. Immemorial payment of teind duty (not amounting to the full teinds) to the minister of a parish, does not prevent the titular from claiming in future the full teinds ; but as regards arrears the defence of *bona fides* is valid in the case of those who for forty years prior to the suit had so paid. The present rental is the basis for valuation of arrears, except in so far as the vassal can show it was formerly lower. Tacit relocation holds in a tack of teinds, and is available to the vassals paying to the tacksman. — *Easton v. Stirling, Cr. & St.* 90 (1733) ; Alt. M. 1717.

3. A disposition of lands by the titular not referring to the teinds in the dispositive clause, but in other clauses stating that the purchaser should be liable for augmentations, but with warrandice against eviction of teinds, and with a statement that the price paid was that agreed on for stock and teinds, carries the teinds. — *Stewart v. Ker*, 6 P. 81 (1815) ; Rev.

See *LANDLORD AND TENANT*, 47—*PROPERTY*, 2.

II. VALUATION.

4. An action of valuation of teinds having fallen asleep, and the minister having assigned the teinds payable to him, which was re-

cognised by the pursuer for some years, he is bound, on wakening the action, to call the assignees as parties. Error in a decree of valuation in absence is a ground of reducing it. — *Scott v. Mags. of Montrose*, Robert. 96 (1714); Aff.

5. A decree of valuation having been lost, and the *casus amissionis* proved, the sub-valuation may be ratified even after a lapse of a century. — *Lord Advocate v. Duke of Montrose*, 2 P. 15 (1758); Aff.

6. A decree of approbation of a sub-valuation being found after the lapse of 130 years to have been invalid, a new process of approbation may be brought; but if it appear that the minister was not present nor cited at the valuation, the valuation will be invalid. Question as to formal defects and the effect of dereliction of the sub-valuation by over-payments. — *Ferguson v. Gillespie*, 3 P. 534 (1797); Aff. M. 15768.

7. A sub-valuation confirmed, although it did not appear that the minister had been cited, he being only a stipendiary, and the titular having been cited. — *Smith v. Macneil*, 5 P. 244 (1809); Aff. F. C. 3d June 1801.

8. The principal decree of valuation of teinds having been lost, and not supplied, under the Act 1707, for more than a hundred years, an extract in the possession of the party, in which the principal number had become illegible through the wearing of the paper, is inadmissible as evidence of the valuation. — *M'Dougall v. Hogarth*, 1 S. Ap. 5; 3 Bligh, 41 (1821); Aff.

9. A decree of approbation of a sub-valuation of teinds, pronounced in absence of the minister of the parish, may be challenged by reduction. The summons in an action of approbation is competently executed by service on the minister after his presentation, though before induction, along with the other ministers of the Presbytery. — *Duke of Gordon v. Gillan*, 1 W. & S. 295 (1825); Aff. 9 S. Teind Ca. 64.

10. A decree-arbitral pronounced in an extra-judicial submission between the titular of teinds and the heritors, to which the minister of the parish was not a party, does not bind the minister, and cannot be made effectual against him by a summons of approbation to which he does not consent. — *Gordon v. Dunn*, 7 W. & S. 68 (1833); Aff. 10 S. 338.

11. Held that certain lands were not included in lands of the same designation, as to the teinds of which a sub-valuation had been obtained. — *Scott v. Kerr*, 2 S. & M'L. 968 (1837); Aff. 9 S. Teind Ca. 233.

See CONVEYANCING, 13—PARISH, 12.

III. LOCALITY.

12. Remit to review interlocutors altering the locality in an augmen-

tation, on the production of a title to teinds, which in the last augmentation had not been produced. — *Porterfield v. Off. of State*, 6 P. 77 (1815); Rem.

13. Teind duties, payable under the charter either to the superior or to the minister, are liable to be localled on *primo loco*, and when the vassal has, in fact, paid for many years a stipend larger than the duties, it is to be presumed, in a question with the superior, without production of the decree of locality, that they have been so localled. — *Duke of Hamilton v. Mather*, 2 S. & M'L. 586 (1837); Aff. 14 S. 162. See 2.

14. Although a decree of locality in an augmentation may be a *res judicata* in subsequent augmentations, if the right of the heritor to teinds is thereby finally decided, yet a decision on such question does not become *res judicata* if, in the subsequent proceedings, there are found to be free teinds to such amount as renders the decision of the question unnecessary for the present. — *Lord Blantyre v. Earl of Wemyss*, 3 S. Bell, 34 (1844); Rev. 16 S. 1009.

15. The common agent in a locality has implied power to consent to a decree sustaining a claim of *decimæ inclusæ*, and such decree is *res judicata*, although not extracted. — *Earl of Hopetoun v. Ramsay*, 5 S. Bell, 69 (1846); Aff. 3 D. 685.

See 19—PARISH (*Stipend*).

IV. RELIEF AGAINST AUGMENTATIONS.

16. A party holding a long lease of teinds, and assigning it, with warrandice against augmentations, in the same deed in which he conveys landed property, is liable in relief of only such augmentations as are granted within the years of the lease. — *Hepburn v. Callander*, 6 P. 6 (1814); Rev.

17. The patron of a parish having in 1604 acquired a tack of the whole teinds for two hundred and forty years, and having in 1656 assigned the teinds of part of the lands, with warrandice that the teinds assigned should bear no heavier future burden than the rest of the teinds, and his representatives having, under the Act 1690, c. 23, obtained an heritable right to all the teinds not heritably disposed, the warrandice in the assignation of 1656 entitles the assignee to claim that he shall only contribute on an augmentation in proportion to the rest of the teinds. — *Earl of Seafield v. Abercromby*, 1 S. Ap. 485 (1823); Rev.

18. A titular and patron having sold the teinds to an heritor, with obligation on himself, his heirs, and successors, to warrant them against any future augmentations, the heirs of tailzie of the patronage and titularity are liable in relief on the warrandice, without discussing the heirs

of line of the seller. — *Duke of Roxburgh v. Kerr*, 6 W. & S. 526 (1833); Aff.

19. A feu-disposition of lands, the reddendo being of a sum in name of feu-duty, and delivery of a quantity of meal and a sum of money for victual and money teind of the lands, with warrandice against all other feu or teind duties, the disponer being also titular, but not mentioned as such in the disposition, does not make the meal and money so stipulated liable to be allocated *primo loco* as free teinds, nor give the feuar any right to relief of augmentations by the disponer. — *Hamilton v. Duke of Hamilton*, 1 S. & M'L. 65 (1835); Aff. 9 S. Teind Ca. 171.

20. Warrandice against augmentation held effectual after lapse of one hundred and fifty years, and after the original estate of the granter had been judicially sold, the heir of the granter being connected with him by acceptance of a provision under burden of his debts, and at other stages of the descent, by special service as heir of line, tailzie, and provision in another estate held under a destination merely. — *Halket v. Nisbet's Trs.*, M'L. & R. 53 (1839); Aff. 13 S. 497.

21. An obligation, with warrandice to relieve a purchaser of land from future augmentations of stipend, does not pass to another purchaser without special assignation. — *Maitland v. Horne*, 1 S. Bell, 1 (1842); Rev. 3 D. 435.

22. A warrandice against augmentations contained in a contract of sale and subsequent charter is not a personal contract passing to the executors, but is not a contract running with the land, available to all owners of the land. It passes to the heirs of the purchaser, but they must make up their title to it in a suitable form, and a precept of clare in the lands does not carry it, nor a disposition of the lands with general assignation of writs. — *Marquis of Breadalbane v. Sinclair*, 5 S. Bell, 353 (1846); Rev. 16 S. 815.

23. An obligation of relief against augmentations, incorporated in the original feu-charter, runs with the land, and so is effectual without special assignation in the hands of a singular successor against the heir of the superior. — *Duke of Montrose v. Stewart*, 4 M'Q. 499 (1863); Aff. 22 D. 755.

See SUPERIOR AND VASSAL, 19, 23–27—WARRANTICE, 3.

THIRLAGE.

1. A servitude of thirlage cannot be constituted by usage without writing, and lands originally astricted may be liberated by a disposition by the superior, owner of the mill, conveying the lands *cum molendinis*,

&c., in the tenendas, and containing a reddendo of a sum *pro omni alio onere*. — *Coltart v. Frazer*, 2 P. 332 (1774); Aff. M. 16058.

2. An obligation to bring "the whole grain which shall grow upon the said lands, and other stuff and corn they shall happen to grind, to the town of Glasgow's mills, and grind the same thereat, seed and horse corn and bear excepted," applies to *grana crescentia* only, and not to *invecta et illata*. — *Dawson v. Mags. of Glasgow*, 4 W. & S. 81 (1830); Rev. 6 S. 19.

3. Thirlage is always to be considered with a leaning in favour of the lightest form, or that on grindable grain only, and all doubtful words or acts are to be so interpreted, any other form being odious; and the evidence of one witness is not enough to prove that custom had extended it to *grana crescentia*. Thirlage cannot be proved without production of a written title, except in the case of kirk or Crown lands. — *Duke of Argyll v. Macalister*, 6 W. & S. 98 (1832); Rev. 9 S. 763.

See SUPERIOR AND VASSAL, 23.

TRUST.

I. CONSTITUTION, . . . p.	318	V. RIGHTS OF BENEFICI-	
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I. CONSTITUTION OF.

1. A conveyance *ex facie absolute* being alleged by the disponent to have been really in trust, he is allowed to refer the question to the oath of the disponent, and on his failing to depone, the trust is established. A discharge obtained while the party was under caption at the instance of the party to whom it is granted, is void, and the question of the circumstances under which it was granted may be referred to oath of the grantee. — *Arratt v. Wilson, Robert*. 234 (1718); Aff.

2. A reference to the oath of a peer admitted in a question whether a conveyance to him by a vassal was delivered, or was made conditionally, and a reduction of the vassal's title reserved till such oath should be taken. — *Robertson v. Earl of Kinnoul, Robert*. 287 (1720); Rev.

3. A conveyance absolute in terms, but alleged by the granter to have been made under certain conditions, and the grantee having depone that he never heard of any conditions, and the parties through

whom the transaction took place having deponed to the same effect, the conveyance is held unqualified. — *Robertson v. Earl of Kinnoul, Robert*, 394 (1721); *Aff.*

4. An instrument executed by the granter of a prior conveyance for valuable consideration, declaring it to be granted in trust only, is not relevant proof of trust. — *Macpherson v. Macpherson, Robert*, 435 (1723); *Aff.*

5. An absolute disposition to the law agent of the disponent for an inadequate price, not reducible in the circumstances, on the allegation that it was in trust for the creation of a vote. — *Douglass v. Dalrymple*, 2 P. 187 (1770); *Aff.*

6. A., a relation of B., having purchased B.'s estate with the declared object of relieving him from difficulties, and having expressed an intention, in an agreement with a trustee for B., to settle part of the price obtained on a resale on the family of B., and directed deeds for that effect to be prepared, but having died before they could be executed, his representatives are bound in terms of the agreement. — *Duke of Queensberry v. Douglas*, 2 P. 603 (1783); *Aff.* See Contract, 6.

7. An allegation that a purchase of land by one was really made in trust for another, can only be proved by writ or oath. — *Duggan v. Wight*, 3 P. 610 (1797); *Aff. M.* 12761.

8. An allegation that a lease granted to one was granted to him and held really in trust for another, may be proved by parole evidence. — *Gordon v. Tough*, 5 P. 286 (1810); *Aff.*

9. A bill of lading does not make the consignee a trustee, but only depositary, and consequently the property of the goods may be proved otherwise than by his writ or oath. — *M'Gavin v. Stewart*, 4 W. & S. 184 (1830); *Rev.* 6 S. 783.

10. A general trust-disposition having been executed in 1802, and a subsequent general trust-disposition in 1821, revoking all former settlements in so far as inconsistent with it, and the House having decided that in the latter there were no trusts applicable to a certain property, it does not thereby pass to the heirs-at-law, but to the beneficiaries under the first settlement. — *Allan v. Glasgow*, 5 S. Bell, 379 (1846); *Aff.* 4 D. 494.

See DEED, 30—LEGITIM, 7.

II. CONTINUANCE.

11. A trust-deed being granted to the trustees *nominatim* and their assignees, but without mention of their heirs or executors, on the death of the sole accepting trustee the trust right reverts, as to the personal estate, to the personal representative of the trustee. — *Kirkpatrick v. Innes*, 4 W. & S. 48 (1830); *Aff.* 4 S. 629.

12. A trust-deed for a charity gave power to assume new trustees on the occurrence of vacancies; held that this was sufficient provision for continuance of the trust, although the heirs, &c., of the trustees were not named, but if not, the Court had power to give directions for its continuance. Approval of the distinction as to exercising this power between cases where the trust was intended to continue, and those in which it was intended that the heir should take on its coming to an end. — *Miller v. Black's Trs.*, 2 S. & M'L. 866 (1837); *Aff.* 14 S. 555.

13. Question, Whether, on the trustees named in a deed declining to accept, the Court can appoint others with the full powers given in the deed, but decided that, the Court having made such an appointment, the title of the trustees, while it stands, cannot be objected to by one of their own number. — *Preston v. Viscount Melville*, 2 Robin. 45; 8 Cl. & Fin. 16 (1841); *Aff.* 16 S. 457.

See MEMBER OF PARLIAMENT, 4.

III. RIGHTS AND DUTIES OF TRUSTEES.

14. When a trust-deed appointing a *sine quo non* contemplates cases in which the *sine quo non* may be unable to act, the quorum may make a good conveyance though the *sine quo non* declines to accept. — *Forbes v. Honeyman*, 5 P. 226 (1808); *Aff. F.C.* 2d Feb. 1808.

15. Money being left by an English testator to trustees, to be invested in land in England, and, no advantageous opportunity having occurred, being applied under a private Act to the redemption of burdens on the beneficiary's estate in Scotland, for which a bond over the estate was granted to the trustees; held that they were entitled to call up the money and invest it as directed in the will, under direction of the Court of Chancery, on an opportunity offering. — *Marchioness of Annandale v. Marquis of Annandale*, 6 P. 697 (1755); *Rev.*

16. Observed by Lord Eldon, that the appointment by trustees of one of their number to be cashier and agent would in England at least be improper, and that he is not entitled to charge for an accountant in making up his accounts unless it appears that such assistance was necessary. — *Lord Montgomerie v. Wauchope*, 4 Dow, 109 (1816); *Rem.*

17. A married woman named as a trustee may act and vote, although her husband is also named, without exclusion of his *jus mariti*. — *Watson v. Darling*, 1 W. & S. 188 (1825); *Aff.* 2 S. 607.

18. Where a trust-deed orders annuities to be paid, and the residue of the trust funds to be invested in lands, the annuities are to be secured by the appropriation of a sufficient part of the capital, the sur-

plus interest of which is to be applied as the interest of the residue, and the capital itself, as the annuities fall in, applied as capital of the residue. — *Earl of Stair v. Earl of Stair's Trs.*, 2 W. & S. 614 (1827); *Rev.* 5 S. 476. See Vesting, 6, 7, 8.

19. A trustee who has accepted cannot resign, and must concur in all proper acts of administration. He is not entitled to refuse to join in granting a discharge for money repaid the trust to the investment of which he had objected. — *Ouchterlony v. Lord Lynedoch*, 4 W. & S. 148; 7 Bligh, N. S. 448 (1830); *Aff.* 5 S. 358.

20. A direction to trustees to lend a sum on security, taking the interest payable to a party for life, and the principal payable to the trustees or their foresaids at his death, does not imply a gift of the fee to them personally, but a direction to hold it as part of the trust estate. — *Miller v. Black's Trs.*, 2 S. & M'L. 866 (1837); *Aff.* 14 S. 555.

21. The law-agent of trustees having, in conjunction with one of them, who was husband of the heiress-at-law of the truster, and life-rentrix of the trust estate, made up her title as heiress-at-law, and taken from her a disposition of the estate in alleged security of a debt, which disposition he assigned to a third party; held that without a reduction of the disposition, or awaiting the issue of accounting, he was bound, at the suit of the trustees, to restore the estate in *integrum* against the disposition. Three trustees being a quorum, held entitled to sue, the fourth being called as co-defender, and a fifth resident in England, and alleged by the defender to have resigned before the date of the transaction. — *Fraser v. Steven's Trs.*, M'L. & R. 171 (1839); *Aff.* 14 S. 676.

22. Under a trust for the support and maintenance of schools on a specified system, it is competent for the trustees to enter into a contract with existing schools to teach on that system, and such contract will bind the trustees. — *Gray v. Forbes*, M'L. & R. 530 (1839); *Aff.* 15 S. 628.

23. A party having executed a trust-deed conveying all his estate to trustees for family purposes, and afterwards executed an entail, in virtue of a reserved power in the trust-deed, and expressly referring to it, and by subsequent writings shown that his intention was that the entail, though in terms *de presenti*, should not take effect until the trust was fully executed, the trustees are entitled to compel the heir of line to complete their title, though he is also the heir of entail, and had made up titles under it. — *Preston v. Viscount Melville*, 2 Robin. 45; 8 Cl. & Fin. 16 (1841); *Aff.* 16 S. 457.

24. Trustees of a *mortis causa* settlement are bound, before paying legacies, or investing the residue, to retain enough to meet the debts and obligations of the settler, and therefore they cannot be allowed to

plead to such claims that the effects are exhausted by such investments, but are personally liable in such case. — *Cruikshank v. Cruikshank*, 4 *S. Bell*, 179 (1845); *Aff.* 5 *D.* 733.

See MINOR, 18—PUBLIC WORKS, 16.

IV. LIABILITIES OF TRUSTEES.

25. A discharge and disposition to a trustee, gained by fraud and circumvention, will be set aside, except as a security for money actually advanced by the trustee. — *Home v. Home*, *Robert.* 47 (1712); *Aff.* *M.* 5236.

26. Sequestration granted of an estate, long held under a trust for creditors, and in which the House had found the trustee guilty of fraud and failure duly to account. The trustee held liable for a disposition of the estate made by the real owner, who was of weak mind, but with consent of the trustee. Continuance of 25. — *Home v. Home*, *Robert.* 105 (1714); *Rev.* 1714.

27. A creditor purchasing at a judicial sale an estate on which there are several debts besides his own, is bound to communicate to the other creditors the benefit of a bargain made before the sale, to resell the estate to a third party at a higher price. — *Fairholm v. Cockburn*, *Robert.* 317 (1720); *Aff.*

28. Trustees for creditors, appointed with a salary, having imprisoned on a judgment debt a debtor of their debtor, and afterwards consented to his release, are liable for the amount of the debt due by him. — *Abercromby v. Innes*, *Robert.* 457 (1724); *Alt.* *See* 32.

29. A party who has become bound for the purchase-money of reversionary interests, in his own name, but really for behoof of another, to whom he assigns them, nevertheless remains liable for the price under the original purchase, although the party for whom he acted subsequently grants a further bond for the price. — *Stewart v. Gardner*, 2 *P.* 549 (1780); *Aff.*

30. A common agent, in a ranking and sale, cannot purchase the estate if he takes any advantage of the knowledge or authority which his office gives him, and the sale in that case is reducible, even after a considerable lapse of time, saving the rights of tenants; and an account will be taken of the rents received, and set against the price paid and sums beneficially expended on the estate, and the difference will be ordered to be paid back. — *York Buildings Co. v. Mackenzie*, 3 *P.* 378; 8 *Br. P. C.* 42 (1795); *Rev. M.* 13367.

31. He is thus entitled to credit for the expense of making up titles, for planting trees and shrubberies, building houses and offices, and not liable for the expenses of the reduction of the sale. But he is not entitled to charge a factor's fee for receiving the rents, nor for outlay

in boring and seeking for coal. The rents allowed to be computed as received at 11th November in each year, although due at prior terms. — *York Buildings Co. v. Mackenzie*, 3 P. 579 (1797); *Aff.*

32. Trustees for creditors are liable for the defaults of their factor. A decree at the instance of creditors against trustees, jointly and severally, is not *res judicata* against an action of relief by one trustee against another. A trustee who has liberated a debtor to the trust, is personally liable to relieve the other trustees of the amount of the debt. — *Stewart v. Elder*, 6 P. 186 (1816); *Aff.*

33. The law of England refuses to a trustee appointed manager or receiver of the trust by his co-trustees any remuneration, unless the deed expressly authorises it, and as the rule is statutory, and there is no reason for a contrary rule in Scotland, it ought not to be contravened. (Per Lord Cottenham)—But the House will not re-open settled accounts to give effect to it, where the advantage would be small, and the salary had the concurrence of the beneficiary. But held that a trustee so appointed factor or cashier, whether with or without a salary, is the agent of the other trustees, and they are liable for his intromissions only in so far as the character of agent implies, and they are not liable for such intromissions to the extent which they might be in regard to them, were he merely acting as one of the trustees, and therefore they are not liable for the loss of balances held by him which they did all in their power to reduce. — *Home v. Pringle*, 2 Robin. 384; 8 Cl. & Fin. 264 (1841); *Aff.* 16 S. 142.

34. Trustees are not liable to personal diligence upon a heritable bond granted by them “as trustees” only. — *Gordon v. Campbell*, 1 S. Bell, 428 (1842); *Aff.* 2 D. 639.

35. A trustee for creditors, purchasing a debt due by the common debtor, is bound to communicate the benefit of the transaction to the estate, and must assign the debt to the estate on being reimbursed the price paid. — *Hamilton v. Wright*, 1 S. Bell, 574; 9 Cl. & Fin. 111 (1842); *Rev.* 1 D. 668.

36. A *curator bonis* is not entitled to business charges (except for outlay), over and above his commission on the sums passing through his hands, being on the same footing as a trustee. — *Robertson v. Morrison (ex p.)* 6 S. Bell, 422 (1849); *Rev.*

37. Trustees, though not specially directed in the deed as to the securities they may invest the funds in, are bound to select proper securities, and are personally liable for impropriety in such selection, and for want of proper diligence in obtaining payment on parting with the security. Terms of an unusually broad indemnity clause which might protect them from liability under the former head, but not under the latter. — *Thomson v. Christie*, 1 M.Q. 236; 1 Stu. 925 (1852); *Aff.*

38. Trustees held not personally liable for the professional charges of one of their number whom they had appointed to manage the trust, and who had a principal personal interest in it. Doubts expressed on *Cradock v. Piper*, 1 M'N. & G. 664. — *Manson v. Baillie*, 2 M'Q. 80 (1855); *Aff.* 8 D. 511.

See ERROR OF LAW, 5—FORFEITURE, 13—LAW AGENT—MINOR, 18—PUBLIC WORKS, 16.

V. RIGHTS OF BENEFICIARIES.

39. The institute of an entail and apparent heir of the investiture held entitled to be enrolled as freeholder, though the legal estate had been conveyed by his father to trustees for his behoof. Question as to valuation by Commissioners of Supply. — *Speirs v. Campbell*, 3 P. 201 (1791); *Aff.* M. 8808. See Entail, 10—Outlaw.

40. The several beneficiaries under two trust-deeds having, by agreement, after the settlor's death, renounced the latter and reverted to the former deed, as fixing their rights, the whole conditions of the former deed must be considered as adopted by them as at the date of agreement; and therefore a claim by one that an obligation laid on him in the trust-deed to divide a certain sum, on succeeding to it, was to be read as only applying to his succeeding prior to the death of the settlor, is inadmissible, and the obligation remains effectual. And one of the beneficiaries is not entitled to security against a minor daughter of one of the other beneficiaries repudiating the agreement, and claiming under the later deed, beyond the security arising from the warrandice of her father, and mother, and other parties, and the power of the trustees, of whom the beneficiaries formed a majority, to secure the fund apportioned to the daughter. — *Adamson v. Darling*, 6 W. & S. 501 (1833); *Aff.* 10 S. 119.

See FORFEITURE, 9—HERITABLE AND MOVEABLE, 11, 12, 16—HUSBAND AND WIFE, 64—PRESCRIPTION, 6, 10—VESTING—WILL, 33, 34, 35.

VI. INCOME OF TRUST ESTATE.

41. An heir is not entitled to interest from the testator's death on sums bequeathed to trustees to be invested in land for his benefit. Query, Whether he would be entitled to interest after the lapse of a twelvemonth after the death? — *Earl of Stair v. Earl of Stair's Trs.* 1 W. & S. 72 (1825); *Aff.* 2 S. 205. See 2 W. & S. 414 and 614—Entail, 48.

42. A trust-deed having directed an estate to be settled on the first of a series of unborn heirs who should attain twenty-one, and assigned the rents to the truster and his trustees for the use and behoof of the

heirs in their order, the rents accumulate for the benefit of the contingent heir, and do not belong during the interval to the heir at law, as if undisposed of. Question, What would have been the rule if no express assignation of rents? Costs allowed out of the estate?—*Graham v. Templer*, 3 W. & S. 47; 3 Bligh, N. S. 381 (1828); *Aff.* 4 S. 460.

43. There is no common-law rule in Scotland against accumulation for at least the period of thirty years or lives in being, and the Thellusson Act (39 and 40 Geo. III. c. 98) applies in Scotland only to personal property. — *Earl of Strathmore v. Strathmore Trs.* 5 W. & S. 170 (1831); *Aff.* 8 S. 530.

44. The trustees of a will being directed to invest the funds in land, and on occurrence of a certain event to entail the land, the rents till then are undisposed of, and pass to the heir at law. — *Turnbull v. Cowan*, 6 S. Bell, 222 (1848); *Aff.* 7 D. 872.

45. When there is a direction in a will to purchase real estate to be entailed, with no direction for accumulation, the income goes to the heir-at-law from the testator's death. — *Macpherson v. Macpherson*, 1 M'Q. 243 (1852); *Rev.* 12 D. 486.

See ENTAIL, 48.

VII. TRUST FOR CREDITORS.

46. A trust bond for general behoof of creditors extinguishes a prior bond granted for his debt to one of the creditors, if he has notice of, and acquiesces in, the general deed, though he does not sign it. — *Russell v. Cochrane, Robert.* 84 (1714); *Aff.* 1712.

47. A mother having conveyed securities to trustees for the purpose of paying her son's debts, but with a clause bearing that any creditor who might institute an action against the trustees should forfeit all claim to participate, the creditors have, nevertheless, a good title to sue the trustees for the due execution of the trust; and if the heir of the truster does not oppose the action, it is *jus tertii* in the trustees to object the clause of forfeiture. — *Duke of Hamilton v. Earl of Haddington, Cr. & St.* 447 (1750); *Aff.* M. 16201.

48. A trust-disposition for behoof of creditors with power of sale, referring to a separate list of creditors and their debts, and appointing it to be recorded in the Register of Sasines, along with the infeftment on the trust-deed, which was done, does not make the debts real burdens, and on the trustees reconveying, and a judicial sale taking place, the creditors named in the trust-deed can claim no preference. — *Chalmers v. Ross*, 3 P. 417 (1795); *Aff.*

49. Concurrence by a creditor, in a trust-deed by the debtor, is sufficiently proved by a claim lodged under the trust, and if the trust-deed

stipulates for time to be given to the debtor, such concurrence liberates his sureties. — *Mackenzie v. Macartney*, 5 *W. & S.* 504 (1831); *Rev.* 8 *S.* 862.

50. A creditor acceding to a private offer of composition, made subject to the condition that all the creditors should agree to it, is liberated if all do not agree. — *Pattison v. Allan*, 7 *W. & S.* 26 (1833); *Aff.* 7 *S.* 124.

51. When a trust for creditors, acceded to by them, provides for the appointment of a new trustee on the death of the first, it is incompetent for one creditor to apply for sequestration of the rents and a judicial factor, or to bring an action of mails and duties. — *Hamilton v. Littlejohn*, 7 *W. & S.* 380 (1834); 2 *S. & M'L.* 355 (1836); *Rev.* 11 *S.* 217.

52. An obligation in a trust-deed for creditors to grant such farther deeds as may be necessary for the more effectually carrying into execution the purposes of the present trust, is to be read in reference to the property actually conveyed, and is not an obligation to convey other property. — *Hill v. Paul*, 2 *Robin.* 524 (1841); *Rev.* 1 *D.* 27.

53. When a trust-deed for creditors is granted, stating the debts, it obviates the necessity of producing any other evidence of the debts, and makes them no longer subject to the shorter prescriptions which would otherwise have applied to them. The marking of "paid" against a debt in a schedule, without signature, is no evidence of payment, nor admits evidence of a debt similarly marked having been paid. When the trust-deed is not produced by the debtor, a recital of it in an heritable bond is evidence against him. — *Watson v. Johnstone*, 4 *S. Bell*, 245 (1848); *Aff.*

54. A *mortis causa* trust-settlement does not become a proper trust for creditors by a direction to pay the testator's debts, and the fact that he is found to be really insolvent; and therefore a preference is acquired, by arrestment in the hands of the trustees, six months after his death. — *Globe Ins. Co. v. M'Kenzie*, 7 *S. Bell*, 296 (1850); *Aff.* 11 *D.* 618.
See 27, 28, 29, 35—SECURITY, 10.

VIII. PUBLIC TRUSTS.

55. Road trustees appointed by an Act of Parliament, which gives them power to raise money upon the tolls, may exercise this power by a majority, but no one will be personally bound by the mere vote of the majority, in any matter beyond the limits of the statute, even though he was present and did not dissent, unless he has done some act by which he has rendered himself personally liable. — *Cunynghame v. Higgins*, 4 *P.* 401 (1802). *Higgins v. Livingstone*, 6 *P.* 244; 4 *Dow*, 341 (1816); *Aff.*

56. When the road under a Turnpike Act is divided into districts, and a part assigned to a committee of trustees, the committee have for that purpose all the general powers of the Act, including that of appointing clerk and treasurer, and the clerk is the proper party to sue the cautioners for the treasurer. — *Creighton v. Rankin*, 1 *Robin.* 99; 7 *Cl. & Fin.* 325 (1840); *Aff.* 16 *S.* 447.

USURY.

1. A charge for redrawing bills did not amount to usury. — *Cuming v. Pantoun*, Robert. 582 (1726); *Aff.*

2. A time bargain, at a price of 25 per cent. in a year, was not usurious. A penalty of a bond enforced (in a judgment of consent) by the House. — *Charteris v. Earl of Hyndford*, Robert. 471 (1724); *Alt.*

3. A bond, at 5 per cent. interest, for L.12,000, in security for stock value only L.7000, but the capital sum being only exigible in the event of the stock rising 20 per cent., was not usurious. — *Farquharson v. Barstow*, 4 *W. & S.* 9; 4 *Bligh, N. S.* 560 (1830); *Aff.* 5 *S.* 251.

4. Whether the taking more than 5 per cent. for discounting bills was usury was a question for a jury. — *Walker v. Allan*, 4 *P.* 303; 2 *Dow*, 254 (1802-14); *Rem. M. Usury*, Ap. No. 1.

See ACTION, 77—*PARTNERSHIP*, 19—*STATUTE*, 20.

VALUATION.

1. The Commissioners of Supply are not bound to furnish the collector of land-tax with a roll of the persons liable to pay the same. — *Advocate-General v. Comrs. of Supply for Edinburgh*, 4 *M'Q.* 387 (1862); *Aff.* 23 *D.* 933.

2. When a property has been stated in the valuation roll, it must be assessed for all rates directed to be levied according to that roll, and the proper way to raise any question of liability of the property is by appeal against the valuation. — *Greenock Trs. v. Shaws Water Co.* 4 *M'Q.* 593 (1864); *Rev.* 24 *D.* 1306.

See MEMBER OF PARLIAMENT, 7, 13—*TRUST*, 39.

VESTING.

1. A conveyance reserving the grantor's life interest right, which right had been already forfeited, does not suspend the vesting of the right in the grantee. — *Cuming v. Presby. of Aberdeen, Robert*. 364 (1721); *Rev.*

2. A bond of provision to a son *nominatim*, with interest from date, but the principal not payable for five years, vests on being granted. — *Campbell v. Pollock, Robert*. 324 (1720); *Aff. M.* 6342.

3. A bequest to a son, payable on his arriving at thirty-one, or being married, but declared to fall into the residue if he should die under thirty-one or unmarried, vests on his attaining the age, though unmarried, the word *or* in the gift over being allowed to be read as if it were *and*. — *Grant v. Dyer, 2 Dow*, 73 (1813); *Rev.*

4. A *mortis causa* disposition to trustees for the life interest use of the disponent's widow, and after her death or second marriage, for the use of his brother and his heirs and assignees, in fee, if he should then be in life, with a direction that immediately after the death of the disponent and his wife, or the survivor, the trustees should convey to the brother, if in life, but if he should have predeceased then to a substitute, vests the fee in the substitute, on the death of the brother in the lifetime of the widow, and a general disposition by the substitute will effectually convey the fee, even though he also dies before the widow, and the fee was given to him alone, without mention of his heirs and assignees. — *Leitch v. Leitch's Trs.*, 3 *W. & S.* 366 (1829); *Aff.* 4 *S.* 659.

5. A deed of settlement having directed the trustees to denude, at majority of the eldest, in favour of the children procreated of the body of A. then deceased, (leaving two daughters), and of B., who then had no children, the male children always excluding the female, and if no male, then the females taking as heirs portioners. Held that the division was to be bipartite, the daughters of A. taking one-half equally between them, and the male sons of B. taking the other half, and the division being made on the eldest of the daughters of A. attaining majority, the sons of B. finding caution to make good the shares due to any other sons who might thereafter come into existence; costs given out of the estate. — *Bryden v. Bryden*, 6 *W. & S.* 354 (1833); *Aff.* 9 *S.* 457.

6. The residue being directed by a testator to be invested for the payment of annuities, and on the capital sums becoming tangible by the death of the annuitants, to be divided among certain parties, and the survivors and survivor, at their majority or marriage, with right to the interest till payable, and power to the trustees to advance the share

of each, and in the event of the death of any before payment, his share to descend to his issue. Held that the shares did not vest till after the falling in of the annuities. — *Pearson v. Casamajor*, *M'L. & R.* 685 (1839); *Aff.* 15 *S.* 275.

7. A trust settlement directed a sum to be paid to the family of A. subject to his distribution, and interest to be paid by A. on the legacies till his death, and after the purposes of the trust were fulfilled, the residue to be paid to the settlor's nearest relations then living. Held that the purposes were not fulfilled till after the death of A., and that it was incompetent for him, by agreement with his own family, to terminate the trust at an earlier period, so as to claim the residue as being himself the nearest relative living at such period, excluding such as might be the nearest after his death. — *Scott v. Scott*, 7 *S. Bell*, 143 (1850); *Aff.* 9 *D.* 1264.

8. A direction that "after executing the purposes of this trust, the free residue shall belong to A," the purposes being, *inter alia*, the payment of annuities, for which A. is to give in addition his personal bond, vests the residue in A. at the testator's death, and entitles him to immediate possession. — *Pursell v. Newbigging*, 2 *M'Q.* 273 (1855); *Aff.* 15 *D.* 489.

9. Under a direction to pay the residue of an estate under a trust settlement, after the death of the survivor of the testator and his wife, to certain parties, declaring that if any should die without issue before his share vested, it should be divided among the survivors, the sums do not vest till the period of payment. Costs allowed out of the fund. — *Young v. Robertson*, 4 *M'Q.* 314 (1862); *Rev.* 22 *D.* 1527.

See ALIMENT, 2—CONQUEST, 3—FEE AND LIFERENT, 18—HUSBAND AND WIFE, 51—TRUST—WILL (*Legacies*).

WAGER.

No action lies on a wager. — *Bruce v. Ross*, 3 *P.* 107 (1788); *Aff.* *M.* 9523. See SALE, 15.

WARRANTICE.

1. An agreement of sale having bound the seller to give absolute warrantice, and the vendee having assigned his right to a party who was aware of a defect in the title, the assignee must take it as it stands, with warrantice from fact and deed only, or renounce the bargain. — *Hepburn v. Aikman*, 2 *P.* 327 (1773); *Aff. M.* 14179.

2. Warrandice of a property is not warrandice of its sufficiency for the purpose for which it is purchased, unless that purpose is distinctly stated. A reference to missives of sale in the conveyance will not let them in to interpret the conveyance, unless it specifies which missives. In an action on warrandice, a conclusion for damages, in case of eviction, will not render it an action *quanti minoris*, and the formal objection on this ground is not waived by the defender stating that he is ready to meet such conclusion if the Court should consider that it could competently be entertained. — *Hughes v. Gordon*, 1 *Bligh*, 287 (1819); *Rev. F. C.* 15th June 1815.

3. On the sale of an estate warrandice was granted against augmentations of stipend, and it was declared that the price might in part be retained till real warrandice was given. With the price two estates were purchased, and strictly entailed; over one of them a bond of warrandice was given, but not over the other. Held that both estates were liable to be adjudged in warrandice, even after they came to be vested in a substitute heir of tailzie. — *Justice v. Callander*, 4 *W. & S.* 94 (1830); *Aff.* 5 *S.* 68.

See CONVEYANCING, 18—FRAUD, 3—HUSBAND AND WIFE, 38—
LANDLORD AND TENANT, 7, 45—MINES AND MINERALS, 2—PRE-
SCRIPTION, 15—SALE, 28—TEINDS, 16–23.

WAY.

1. Road trustees have not power, on opening or improving a road, to shut up of their own authority another road, and convey the solum. — *Walker v. Weir*, 6 *P.* 281 (1817); *Rev.*

2. When the inhabitants of a burgh have a servitude of footpath, they are entitled to prevent the owner of the property from arching it over further than to the extent necessary to carry a roadway across, and on condition of the side walls of the arch being at least 7 feet 4 inches in height. — *Allans v. Mags. of Rutherglen*, 4 *P.* 269 (1801); *Aff.*

3. A servitude of road alleged to be constituted by usage for forty years, but the road having been ploughed up for twenty or thirty years previous to action brought, held not established. — *Hill v. Ramsay*, 5 *P.* 299 (1810); *Aff.*

4. The claimant of a servitude of road by prescription must state definitely the extent of his claim, and the purpose for which the road is required, even when it leads to the sea-shore; and he must support it by evidence of use of himself, or tenants, or servants, though, had it

been by grant, the evidence of others would have been admissible. — *Earl of Morton v. Stuart*, 5 P. 720; 1 Dow, 91 (1813); *Rev.*

5. A right of way may be acquired by forty years' use at any time, and if so acquired, it is not lost by subsequent interruptions not acquiesced in. Use for as far as memory could reach (thirty-four years) prior to 1789, when an interruption was attempted, held to warrant a presumption of forty years' possession previously. — *Harvie v. Rodgers*, 3 W. & S. 251; 3 Bligh, N. S. 444 (1828); *Aff.* 5 S. 917.

6. On an averment of being in the habit of using a road, and having occasion to use it, it is competent for an individual to bring a declarator of right to use it. Opinion, that one of the public may bring a declarator to establish a public right of road. — *Duke of Atholl v. Torrie*, 1 M'Q. 65 (1852); *Aff.* 12 D. 328.

7. A right of way must be between public places, but it is sufficient if the terminus be a public way. If the witnesses prove public usage for many years anterior to a certain date, there is a presumption of fact, in the absence of counter-evidence, that it extended to forty years, and so established the right, and evidence of subsequent interruption for less than forty years will not destroy the right, though it may be evidence against its ever having been constituted. A private Act establishing a tow-path does not take away an existing right of way. — *Campbell v. Lang*, 1 M'Q. 451; 2 Stu. H. L. 76 (1852); *Aff.* 13 D. 1179. *Young v. Cuthbertson*, 1 M'Q. 455 (1852); *Aff.* 14 D. 465.

See SHERIFF, 4—TRUST, 55, 56.

WHALE FISHING.

1. On a whale being struck, and afterwards getting loose, it becomes the property of the first subsequent striker whose harpoon remains fast till it is killed. — *Addison v. Row*, 3 P. 334 (1794); *Rev.*

2. The rule that a whale after being harpooned becomes subject to be captured by another vessel if the line becomes detached from the boat which first struck it, is general in the North Sea, and is not restrained in any place by an alleged local custom of attaching an inflated skin to the end of the line before it is cut adrift from the first boat. — *Aberdeen Arctic Co. v. Sutter*, 4 M'Q. 355 (1862); *Rev.* 23 D. 465.

WILL.

I. CHARACTER, p. 332	V. LEGACIES, p. 335
II. INTERPRETATION, . . . 333	1. <i>Institution and Substitution</i> , 335
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See also FOREIGN (Wills).

I. CHARACTER.

1. The removal into his own custody, by the beneficiary, of a testator's *mortis causa* deeds, two days before the testator's death, is presumed to be by the testator's direction, and the deeds are presumed to contain the last will, on none later being found, though some evidence is given of an apparent inconsistent intention on the testator's part. — *Schaw v. Houston*, *Robert*. 552 (1726); *Aff*.

2. A heritable debt secured by adjudication being conveyed to trustees for certain purposes, reserving power to alter, it may be carried to the purposes expressed in a will executed subsequently. — *Willock v. Ouchterlony*, 3 P. 659 (1772); *Aff. M.* 5539.

3. A will set aside which was prepared by the sole executor and legatee under it, a stranger in blood to the testator, and brought by him to the house of the testator, when on his deathbed, at which time he also burned, without authority from the testator, a prior will, although the solicitor who prepared the second will, and witnessed its execution, deponed that the testator was of sound mind when he executed it. — *Fyfe v. Williamson*, 3 P. 478 (1796); *Aff*.

4. A paper, holograph and signed, being instructions for a codicil, sent to the law agent of the deceased, and called "my codicil," yet being evidently in reference to a codicil to be prepared and incomplete, held not testamentary. Observed that in the case of a will to affect property in England, the Court of Session ought not to decide on its validity before it is proved in England. — *Munro v. Coutts*, 1 Dow, 437 (1813); *Rev*.

5. Any person may prescribe to himself solemnities of execution of a will beyond what the law imposes, and therefore if he states that he has set his hand and seal to his will, it will be bad if not sealed, and held to be cancelled if the seal seems to have been cut off, with the intention (which may be gathered from other facts) of cancelling it. — *Nasmyth v. Hare*, 1 S. Ap. 65 (1821); *Rev*.

6. A probative testament having directed bequests to be paid by the executor, as directed by a letter signed by the testator of the same date, and a letter being found corresponding in character and date, but not

holograph nor tested, the letter is part of the will, if it is the one referred to, and whether it is so is a question for a jury on the evidence. — *Inglis v. Harper*, 5 W. & S. 785 (1831); *Rev.* 6 S. 864.

7. When a domiciled Englishman made a will bequeathing heritage in Scotland, with other provisions, and on finding it would not suffice to pass the heritage, made a proper disposition of the heritage, which referred to the bequest of a personal fund in Scotland made by the will, and then made a second will, not expressly revoking the first, and referring to the disposition; held that the second will, through these references, either kept the first in force to that extent, or that the statement of intention contained in the reference was a sufficient declaration of bequest. — *Yeats v. Thomson*, 1 S. & M'L. 795; 3 Cl. & Fin. 544 (1835); *Aff.* 10 S. 565.

8. A number of separate testamentary writings of different dates, some prepared by professional men and others not, several designated as the "last will," but none expressly revoking nor wholly inconsistent with the others, held to constitute together the will of the deceased. Costs ordered to be paid out of the fund. — *Stoddart v. Grant*, 1 M'Q. 163; 1 Stu. 1069 (1851); *Rev.* 11 D. 860.

9. A testamentary writing alleged to be holograph of the testator, must be proved to be in his handwriting before being admitted to confirmation; it is not enough that it bears to be signed by him, and appears to be in the handwriting of the party signing. — *Anderson v. Gill*, 3 M'Q. 180 (1858); *Aff.*

10. A will is not cancelled by erasure, unless the purpose was to cancel it. Opinion that in a holograph writing the words erased may be looked at for the explanation of what remains. In a will the omission of a word by evident clerical error may be supplied by the word appearing, in a subsequent codicil, to have been evidently supposed to have been used in the will. The expression of a wish is equivalent to a direction or bequest. — *Mags. of Dundee v. Morris*, 3 M'Q. 134 (1858); *Rev.* 19 D. 918.

See DEATHBED, 12, 19—DEED.

II. INTERPRETATION.

11. A legacy of a half-year's wages to all servants applies only to those who are servants at the testator's death. — *Robertson v. Marquis of Annandale*, Cr. & St. 293 (1740); *Aff.*

12. Residue held in the case to signify residue as at the death of the testator. — *Little v. Little*, 2 S. Ap. 202 (1824); *Aff.*

13. Meaning of particular expressions must be limited, if requisite, to permit general intent to receive effect. (Per Lord Eldon.) — *Earl of Stair v. Stair's Trs.*, 2 W. & S. 623 (1827).

14. The residue being given to the "nearest relations," and the testator having in the will given gifts equally to his relations of the half blood as of the full blood, the former are included in the term. — *Scott v. Scott*, 2 M'Q. 281 (1855); Aff. 14 D. 1057.

See also HEIRS—VESTING.

III. APPROBATE AND REPROBATE.

15. The creditor in a debt on which adjudications had been used, conveyed it to his brother in liferent, and to his nephew in fee, reserving power to alter; by will, subsequently, he gave the residue of his personal estate to the brother in liferent and nephew in fee, on condition of the nephew's paying to the brother during his life the interest both on the debt above stated, and also the interest on three other bonds on which adjudication had also passed; and the brother by will bequeathed to others all his personal estate, including rents, interest, and profits due at the time of his death. Held that the brother was entitled to the interest due to his death on all the bonds, and though it had not been paid, it was carried by his will. — *Willock v. Ouchterlony*, 3 P. 659 (1772); Rev. M. 5539.

16. A party who has taken benefit under a will for sixteen years is not entitled to reprobate it in order to claim as heir-at-law. — *Martin v. Martin*, 3 P. 421 (1795); Aff.

17. A general settlement having burdened the disponent with legacies, and contained no procuratory or precept, and the disponent having repudiated the settlement, but intromitted in part with the funds, and accepted a gratuitous disposition from the heir-at-law who made up titles, he is liable for the legacies. — *Wyllie v. Ross*, 2 W. & S. 576 (1827); Aff. 4 S. 172.

See FOREIGN, 8-12.

IV. CONDITIO SI SINE LIBERIS.

18. A grandchild held to fall within the doctrine *si sine liberis*, though the settlement under which she claimed was made in favour of "children alive at my death," and she was born and her father had died long before the grandfather's death, who had also, when her father was married, apportioned to him his share of the then estate. — *Booth v. Booth*, 6 W. & S. 175 (1832); Aff. 9 S. 406.

19. In the case of provisions granted to children by a trust-deed, the condition *si sine liberis* applies to a provision of the residue as well as of specific legacies, and whether there is a substitution in default of the child or not, and also to the issue of a child predeceasing, although the gift was not made to the child and his heirs, and the testator

knew of their existence, and although in other cases he had expressly given the provision to the child and his heirs. — *Dixon v. Dixon*, 2 Robin. 1 (1841); Aff. 14 S. 938.

20. Under a clause of survivorship in a bequest to a number of persons, although the son of one dying before the period of vesting takes his father's share, he does not participate in the division of other lapsed shares. — *Young v. Robertson*, 4 M'Q. 337 (1862); Aff. 22 D. 1527.

V. LEGACIES.

1. Institution and Substitution.

21. A general settlement of personalty to A., and in case of A.'s decease, to B., carries the right to B. in the case of A.'s death before taking up the succession, and is not affected by a prior general settlement by B. of all effects which may belong to him at death. — *Campbell v. Campbell*, Cr. & St. 343 (1743); Aff. M. 14855. See 26.

22. A testator having bequeathed one-fourth of his estate to his wife absolutely, and the remaining three-fourths among different families of nephews, declaring "that if any of my nephews should die before my will takes place, I bequeath the share of him so dying to his brother or brothers-german, and the heirs of his or their bodies, to be between or among them equally divided," and having then declared "that such three-fourths shall not take place, or be paid till after" his wife's decease, if she continued single, and having given the interest of it for life to her; held that the legacies to the nephews vested on the testator's death, though his wife survived, but that the substitution in favour of the brothers took place in the case of a nephew surviving him, but dying intestate before his wife, without leaving issue, and the legacy being moveable, neither service nor confirmation was necessary to make the substitution effectual. — *Duncan v. Fowke*, 2 P. 290 (1773); Aff. M. 8092.

23. A provision to grandchildren in a trust-deed, equally divisible, with clause of survivorship as to the share of any one deceasing, so far as it remained unpaid, and declaration that the share should become due and payable at the respective ages of twenty-five years, is only a conditional institution, and the shares vest absolutely at twenty-five, though not paid by the trustees at that date. — *Graham v. Russell*, 3 P. 210 (1791); Aff.

24. A testator on the same day bequeathed by will his personal estate to his only son, and by a separate deed declared that in the event of his real estate going to a collateral heir, through failure of the issue male of his body, he disposed the furniture, &c., in his house to

the heirs to succeed him in the estate. Held that the disposition to the heirs of entail was only a conditional institution, and that the son, on surviving, was entitled to dispose of the furniture by his will. Heirship moveables descend to the heir of line, excluding the heir of entail. — *Lockhart v. Ross*, 6 P. 31 (1814); *Aff.*

25. A declaration appended to a legacy, given by the joint will of husband and wife, that in the event of the death of the legatee before the death of the survivor of the testators, the legacy should fall to the legatee's executors and nearest of kin, makes the nearest of kin conditional institutes, and the legacy does not pass to the assignee of the predeceasing legatee. — *Lawson v. Stewart*, 2 W. & S. 625 (1827); *Aff.* 4 S. 384.

26. A provision to a brother and sister to be paid at majority, with direction that, on the death of either, the survivor shall succeed to the whole, and in the event of the death of both without children, a third party should succeed, is a conditional institution in favour of the third party, which is evacuated by the survivor of the brother and sister attaining majority, though dying before receiving payment; and a provision to a grandson, payable on his attaining majority, but failing his attaining majority, or specially disposing it thereafter, then to another, but which on his attaining majority he has taken steps to obtain payment of and realise, becomes vested in him, and on his death before receiving payment, passes to his representatives. Observations on *Campbell v. Campbell*, 1 Cr. & St. 343 (No. 21), and *Brown v. Coventry*, Bell's Ca. (1792). — *Greig v. Johnston*, 6 W. & S. 406 (1833); *Aff.* 9 S. 806.

See CONQUEST, 3—VESTING.

2. Conditional.

27. A gift being made subject to a condition of forfeiture, in the event of the donee interfering with the management of certain trustees, and the trustees never having acted, the forfeiture cannot take place. — *Charteris v. Lord Advocate*, Cr. & St. 463 (1750); *Aff. M.* 7283.

28. A legacy given on the narrative that the ultimate heir-at-law will succeed to all the entailed and other estates, is not payable if he in point of fact succeed only to the entailed estate, the rest being conveyed by an intermediate owner to the legatee himself. — *Moncreiff v. Skene*, 1 W. & S. 672 (1825); *Rev.*

See HUSBAND AND WIFE, 23, 24, 25—PROVISION, 11.

3. Satisfaction and Compensation.

29. It being found that there was not evidence of a sum being due

by a testator as a debt, for work done, it was held that supposing such a debt existed, there was no ground for regarding a legacy to the claimant as to be imputed towards the extinction of the debt, but no expenses were given on either side. — *Arrol v. Spaden*, 1 S. Ap. 164 (1822); *Rev. F. C.* 14th Jan. 1819.

30. Circumstances in which bills blank endorsed and given by the testator on deathbed, were held to be in satisfaction *pro tanto* of a bequest of half his estate. — *Buchanan v. Crawford*, 2 S. Ap. 445 (1824); *Aff.* 1 S. 346.

31. Compensation, when pleaded against a legacy, must be by a liquid debt established by undoubted evidence. — *Reid v. Hope*, 1 W. & S. 172 (1825); *Rev.* 2 S. 408.

32. A testator having given a legacy of L.1500 to each of his children *nominatim* in liferent, and their children respectively in fee, with proviso that any sum he might thereafter give in his lifetime should be imputed in part satisfaction of this sum, and having given L.1000 to one of his children, who predeceased him; held that the children of that child could not claim the L.1500, except under deduction of the L.1000 so given. — *Hutchison v. Skelton*, 2 M'Q. 492 (1856); *Rev.* 15 D. 570.

4. Payments.

33. A party conveyed his whole estate, heritable and moveable, to trustees for payment of certain legacies, with power to sell certain lands and stock specified for payment of the legacies, the balance to be invested in land and entailed, and the remaining lands to be also entailed; and the personal property left being insufficient to pay the debts, so that the whole lands, including some which were directed to be entailed, were brought to a judicial sale. Held that the legatees were entitled to rank for full payment on the balance of the price after payment of debts, though the price of the lands directed to be sold should prove insufficient. — *Hamilton v. Bennet*, 6 W. & S. 533 (1833); *Aff.* 10 S. 330.

34. By a *mortis causa* settlement certain annuities were given, with provision for abatement if the funds proved insufficient, and for disposal of the residue if the funds were in excess, and by a subsequent clause legacies were given in the event of the funds being of a certain amount. Held that the legacies had in that event priority over the annuities, and that the latter must abate. — *Pearson v. Casamajor*, M'L. & R. 685 (1839); *Rev.* 15 S. 275.

35. When a settlor leaves land to be sold for the payment of annuities and legatees, if the annuitants do not compel the sale, they are not

entitled to have any deficiency which may arise from that neglect made good out of the interests of those residuary legatees who would have had a share had the property been converted at the proper time. — (Per Lord Cottenham.) Terms of trust-deed which were held in accordance with this rule of law, and under which a surviving annuitant was held entitled to only the free income of one-half of the trust-fund, though less than the intended annuity, while the other half was divisible, on the lapse of the other annuity, among the residuary legatees. — *Casamajor v. Pearson*, 2 *Robin.* 217; 8 *Cl. & Fin.* 69 (1841); *Rev. F. C.* 6th June 1840. See Trust.

See HUSBAND AND WIFE, 35.

WRITERS TO THE SIGNET.

This body forms a corporation, but has not power to increase their legal fees. The members have the exclusive privilege of preparing and signing Signet letters, and signing summonses passing the Signet, and therefore either to prepare or revise these last for the usual fees, but they have no exclusive privilege in regard to advocations or suspensions. They may enter into partnership with others as regards the branches of their business not exclusive, but not as to their exclusive privileges. — *Soc. of W.S. v. Soc. of S.S.C.*, 4 P. 326 (1802); *Aff. M. Coll. of Justice*, Ap. No. 1.

See CORPORATION, 2—COURT OF SESSION, 3—LAW AGENT, 9.

WRITTEN DOCUMENT.

I. INTERPRETATION OF, . p. 338 | II. PAROLE EVIDENCE, . p. 339

I. INTERPRETATION OF.

1. The dispositive clause being to the disponent and his heirs whatsoever, and the procuratory to him and his heirs male, the latter controls and explains the former, and the heir male excludes the heir of line. — *Halliday v. Maxwell*, 4 P. 346 (1802); *Aff.*

2. A clause in a deed must be read in connection with the whole deed. The clause, "The division to run thus as 9 to 10,—i.e., for every L.10 that shall fall to the share of each of my sons, my spouse and

three youngest daughters shall be nine," held to give the proportion of L.9 to each of the daughters and the spouse, and not among them as a class. — *Brodie v. Brodie*, 6 P. 270 (1817); *Rev.*

3. Words of fixed legal meaning receive that construction in spite of apparent intention. (Per Lord Eldon.) — *Dewar v. M'Kinnon*, 1 W. & S. 161 (1825).

4. Recitals are admissible to explain the operative part of a deed, but not to enlarge or control it, and they may prove the contents of a lost deed, or the nature of a bargain not reduced to writing. Interpretation of interest of partner under deed without liability for loss. — *Mackenzie's Trs. v. Mackenzie's Trs.*, 5 W. & S. 796 (1831); *Aff.* 8 S. 781.

5. Construction of an agreement respecting an assignation of bills of lading. — *Guthrie v. Anderson*, 4 W. & S. 20 (1830); *Aff.* 5 S. 694.

6. Terms of an agreement to discharge claims in respect of illegal proceedings, which were held to bar the party discharging from claiming relief against them in an action brought against him by a third party. — *Craig v. Duke of Hamilton*, 7 W. & S. 483 (1834); *Aff.* 9 S. 632.

7. When a clause comprises provisions intended to meet a variety of different cases, the true mode of interpretation is to look at what it directs in the particular event which has happened, without taking account of obscurities which it might have presented in a different event. — *Dill v. Earl of Haddington*, 2 Robin. 298; 8 Cl. & Fin. 168 (1841); 2 D. 214.

See HEIRS—STATUTE—WILL.

II. PAROLE EVIDENCE.

8. Two testamentary deeds, nearly identical in terms, but differing in amounts, being found in the repositories of a deceased person, it is competent to examine the attesting or other witnesses, in order to ascertain whether the later supersedes the former. — *Falconer v. Falconer, Robert.* 377 (1721); *Rev.* *Falconer v. King's College Aberdeen, Robert.* 397 (1722); *Rev.*

9. Feuars of building land, to whom a plan of the adjacent grounds, laid out as pleasure-grounds, had been shown by the superior at the time when the lands were advertised to feu, with an undertaking that no buildings should be erected on the proposed pleasure-grounds, held entitled to interdict against streets being laid out on the proposed pleasure-grounds, though in their charters no notice was taken of this stipulation. — *Deas v. Mags. of Edin.* 2 P. 259 (1772); *Rev.* See 12.

10. A lease contained a clause binding the tenants to remove at certain breaks, in the option of the lessor and the lessee; remit to the Court to admit evidence to ascertain the meaning of the parties. — *Lord Falconer v. Taylor*, 2 P. 373 (1775); *Rem.*

11. A sale of goods to be delivered being made by writing, payment being stipulated for in bills at three months, and a third party guaranteeing their payment; remit to allow a proof of allegations that it was understood the bills should be discountable, and that they would be discounted by a banker, stated to be also a partner in the guarantor's house. — *Stein v. Stewart*, 3 P. 462 (1796); *Rev.*

12. Exhibition of a plan to intending purchasers, showing certain houses removed beyond the limits of the seller's property, but which is not referred to in the charters granted, does not amount to a warranty or make the plan part of the contract. Observations on *Deas v. Mags. of Edinburgh* (No. 9). — *Heriot's Hospital v. Gibson*, 2 Dow, 301 (1814); *Rev. F. C.* 17th Nov. 1814, *note.*

13. Ground being feued in lots for building, as delineated on a plan, in which no provision was shown for separating the lots, or any stipulation as to the buildings to be erected, a feuar of one lot is not liable to be restrained at the instance of another from erecting buildings, not forming a legal nuisance, on the back area of the house first erected on his lot. Observations on the cases of *Deas v. Mags. of Edinburgh* and *Heriot's Hospital v. Gibson* (Nos. 9 and 12). — *Gordon v. Marjoribanks*, 6 P. 351; 6 Dow, 87 (1818); *Aff. F. C.* 17th Nov. 1814, *note.*

14. Usage, contemporaneous and continued, is admissible to expound the meaning of old instruments. — *Heriot's Hospital v. M'Donald*, 4 W. & S. 98 (1830); *Aff.* 9 S. *Teind Ca.* 156.

15. A bargain being constituted by letters, an undated paper, written by one of the parties' agents, stating professedly its terms, but not subscribed by the other party, is inadmissible to explain it. — *Pentland v. Lady Gwydir*, 4 W. & S. 322 (1830); *Aff.*

16. The question of what is intended to be conveyed by a particular expression in a deed is neither a latent nor a patent ambiguity, but always a question of evidence. (Per Lord Cottenham.) — *Logan v. Wright*, 5 W. & S. 242 (1831); *Aff.* 8 S. 247.

17. Action being brought by a passenger in a canal boat against the canal company and the owner of a boat on the canal, jointly and severally, for reparation for a hurt caused by a collision, and it being compromised by the counsel for all the parties, by a written agreement that the defenders should pay the pursuer a certain sum, and all questions between the two defenders should be reserved entire, and in mutual actions of relief by the two defenders, the jury having found

that neither was in fault; held that the agreement imported that in these circumstances each defender should pay half the sum for which the original action was compromised, and that it was not competent for the one party to prove that he had consented only on the understanding that he should be wholly relieved from payment, unless he was found liable in the action of relief. — *Johnston v. Edin. and Glasg. Union Canal Co.*, 1 S. & M'L. 117 (1835); Aff. 12 S. 304.

18. A clerk having refused a salary offered as too low, but worked for several years, claiming the rates usually paid according to the work done, but which his master never paid in full, he was held entitled to a further allowance, based on the practice of the profession, but subject to a certain deduction. — *Baillie (Clyne's Trs.) v. Stewart*, 2 S. & M'L. 45 (1838); Alt. 11 S. 727. |

19. Evidence as to a written contract is admissible, not to prove its meaning, but to ascertain if it formed a contract at all. — *Stewart v. Menzies*, 2 Robin. 547 (1841); 8 Cl. & Fin. 309.

20. Evidence is admissible to prove that an absolute conveyance was intended as in security only, such evidence not being to interpret the deed, but to control it by a superadded equity. There is a presumption that an assignation of policies of assurance of some standing for a debt is in security only. — *Scot. Un. Ins. Co. v. Marquis of Queensberry*, 1 S. Bell, 183 (1842); Aff. 1 D. 1203. See Trust, 1, 7, 8.

21. A *mortis causa* deed by a mother in favour of her eldest son, bearing to be in consideration of his having granted her a bond of life-rent provision, and not containing a clause of revocation, and delivered to the joint agent of both parties, is irrevocable, and prior letters cannot be referred to for the purpose of proving that the son stipulated only for a portion of the personal estate, though they may be referred to, to prove that the statement in the settlement that it was granted for onerous causes was correct. A bill indorsed by the mother to another party, subsequent to the settlement, was also reduced. — *Stewart v. Stewart*, 1 S. Bell. 796 (1842); Aff.

22. Letters written simultaneously with execution of a deed of agreement held admissible in construing it, but in the circumstances not to import an alteration. — *Ferrie v. Ferrie*, 2 Stu. H. L. 1 (1852); Aff.

23. The assignor of a written contract cannot give evidence of any parole understanding between the original contractors, but he may of an understanding attached to the terms of the document in the usage of trade. — *Mackenzie v. Dunlop*, 3 M'Q. 22 (1857); Aff. 16 D. 129.

24. Evidence of mercantile custom consists in evidence of a number of particular instances, and evidence of any one instance is admissible

in law, however slight in fact to weigh with the jury. — *Mackenzie v. Dunlop*, 3 M'Q. 22 (1857); Aff. 16 D. 129.

25. A verbal permission by the lessor to waive a condition of a written lease, if followed by operations consequent on such waiver, may be proved by parole, and this is the case even though the operations have gone beyond the alleged permission. — *Bargaddie Coal Co. v. Wark*, 3 M'Q. 467 (1859); Rev. 18 D. 772.

26. A witness to prove usage of trade cannot, in cross-examination, be asked what the receiver of a letter would be entitled, according to mercantile usage, to understand from its terms. — *Kirkland v. Nisbet*, 3 M'Q. 766 (1859); Aff. 21 D. 1.

27. Parole evidence is admissible to prove what took place at a meeting of certain parties with their joint law agent, at which a bond of security prepared by him was signed by them, in an action of damages against him for rendering such security unavailable by himself taking a preferential security, for which he was subsequently sued by one of the parties. — *Gemmil v. M'Alister*, 4 M'Q. 449 (1863; Aff. 24 D. 956).

See BANK, 8—BOND, 5, 7—DEATHBED, 12—HUSBAND AND WIFE, 50—INFERTMENT, 13—LANDLORD AND TENANT, 51, 52, 68, 69—PATRONAGE, 11—PRINCIPAL AND AGENT, 12—PUBLIC WORKS, 1, 10, 12, 21—STATUTE—TRUST—WILL.

WRONGOUS IMPRISONMENT.

1. A petition being presented to the Sheriff for warrant to search the house of the nearest relatives of a party just deceased for writings belonging to the deceased, charging these relatives with theft of the writings, and for warrant to bring the parties before him for examination, and the warrant to apprehend being executed by an officer and a party of soldiers, the petitioner and Procurator-Fiscal are liable in damages. — *Fyfe v. Williamson*, 3 P. 478 (1796); Aff.

2. The date of delivery of a petition for liberation on bail is not conclusively ascertained by the date written on it by the clerk, but may be proved *aliunde*. The Lord Advocate's concurrence in an action for penalties for wrongous imprisonment is not necessary. The Stat. 89 Geo. III. c. 49, increasing the amount of bail, makes no change in the Stat. 1701. Remit to consider other points under the Stat. 1701. Observations by Lord Holland, in a legislative capacity, on the administration of justice in Scotland. — *Andrew v. Murdoch*, 2 Dow 401 (1814); Rem. M. Wrong. Impr. Ap. No. 3.

3. Remit to consider whether the application for a criminal warrant must be on oath, and whether a committal "for further examination, or till liberated in due course of law," is a warrant to which the Act 1701 applies, if it was *bond fide* for further examination only. — *Arbuckle v. Taylor*, 3 Dow. 160 (1815.)

4. Letters of intimation expedite in the Court of Justiciary are inept for liberation of a prisoner confined under charge of a crime not cognisable in that Court, such as fraudulent bankruptcy. Query, Whether the Statute applies to the Court of Session in any case? — *Duncan v. Lord Advocate*, 1 W. & S. 608 (1825); Aff. 2 S. 132.

See MEDITATIO FUGÆ.

GLOSSARY OF TECHNICAL TERMS

OF COMMON OCCURRENCE IN

SCOTTISH LAW.

NOTE.—In explaining Scottish terms, the corresponding terms of the Law of England have, for the sake of brevity, been used whenever their signification approached near enough to the meaning of the word under exposition to convey a correct general idea of its sense. But it will be remembered that, the laws of the two countries being different, their language, even though apparently identical, can never have exactly the same meaning. In explaining Judicial Procedure the language of Equity is generally used, as the Scottish jurisprudence in this respect has, in most cases, a closer affinity to the procedure in Chancery, than to that of Common Law.

No word is explained unless its meaning, or the law which it implies, is essentially different from its signification in ordinary language, or in the Law of England.

ABBEY. The precincts of Holyrood Palace, Edinburgh, still affording protection against execution for debt.

ABBREVIATE. Abstract of a decree of adjudication presented for registration. The certificate of registration is written on the back of the abbreviate.

ABIDE BY, TO. In an action to set aside an instrument as forged, the defendant is required to declare that he maintains, or abides by, its truth.

ABSENCE, DECREE IN. Decree as prayed in the summons (see *Action*), made when the defendant has not entered appearance, or filed defences. It may be generally opened up (set aside) by the Court, on the defendant filing a note before it is extracted, or if extracted (entered), by means of a suspension (see *Suspension*) or of an action of reduction within forty years.

ABSOLVITOR. Judgment for the defendant.

ACCESSARY ACTION. Supplemental suit.

ACCOUNTANT IN BANKRUPTCY. This office was created by the Statute of 1856. The Accountant's duty is to keep registers of sequestrations, and of the several steps in each; to superintend the conduct of trustees, and to report to the Court of Session any neglect or contravention of duty on their part. No money passes through his hands. He is appointed by the Crown; is paid by a salary; and no fees are exacted from the bankrupt's estate in respect of any of his duties.

ACCOUNTANTS. These now form in Scotland a body incorporated by Royal Charter. Members of this body are frequently chosen as trustees in sequestrations. They are also frequently appointed judicial factors (receivers); and matters of accounting in suits, which in England would be investigated before a chief clerk in Chancery, are often referred to them for examination, and that they may make a report on them to the Court.

ACCRESCE, TO. To accrue by survivance; or, to relate back to and confirm, a prior proceeding or conveyance.

ACCRETION. Relation.

ACT AND WARRANT. An order of Court, such as one appointing a receiver, or conferring on him special powers.

ACTION. Ordinary actions in the Court of Session are commenced by a "summons." This, besides being the writ citing the defender (defendant) to appear in Court, contains the "conclusions of the action" (prayer); a "condescendence," or statement of the facts on which the suit is founded, drawn up in separate paragraphs as in a bill in Chancery; and, lastly, a note of the "pleas in law," or legal propositions, which the pursuer (plaintiff) is prepared to maintain in support of his prayer. The summons is served on the defender (see *Citation*), and on expiry of the "induciae" (period of notice) it is "called," i.e., entered in the "calling list," under the title of the Lord Ordinary to whom the cause is to be attached. The calling list is printed and published at fixed periods, generally once a week, and the defender must enter appearance within one day after the publication of the list in which the summons is entered. After appearing he must lodge (file) defences. These consist of "answers" in the form of a direct admission or denial of each assertion in the condescendence of facts in the summons, followed by a "statement of facts" on the part of the defender, and a note of his "pleas in law." Every species of defence, whether matter of demurrer, plea, or answer, must thus be at the first set forth. If satisfied that these pleadings correctly state their respective cases, the parties "close the record on summons and defences;" but if either desires to add to or alter his pleading, he obtains an order to "revise;" and after both parties have revised, the "record is closed," and the case set down for hearing. When heard, the Lord Ordinary pronounces an interlocutor (decree), disposing of the whole case. Either party may appeal against this to the Inner House by "reclaiming-note." (See *Court of Session*.)

Most cases are decided without the aid of a jury, either the facts not being in dispute, or the judge himself determining them on documentary evidence filed by the parties, or on evidence taken orally before himself, or by commission, on points on which he has directed proof to be adduced. But actions for libel, nuisance, and for damages *must*, and several others *may*, be tried by a jury. In such cases the issues to be laid before the jury are prepared by the parties after the record is closed, or settled by the Court if they cannot agree on the form. In some cases the parties are allowed by consent to select a few individuals to act as a jury.

If the defender fails to appear, the pursuer may "take decree in absence." (See *Absence*.) If he fails to file any pleading or other docu-

ment ordered by the Court, the pursuer may "take decree by default." If the pursuer fails to prosecute the suit after service, and before it has been set down for procedure before the Court, the defender may have it dismissed by *Protestation*.

ACT OF GRACE. An enactment requiring a creditor to support in prison a debtor whom he has arrested, on condition of the debtor assigning his whole goods for the benefit of his creditors.

ACT OF PARLIAMENT. Acts of the Parliament of Scotland before the Union are cited by year and chapter, thus Act 1686, c. 5.

ACT OF SEDERUNT. General Rules or Orders made by the Court of Session.

ADHERE, TO. To confirm the judgment of an inferior Court.

ADJUDICATION FOR DEBT. This is what is commonly meant when the word adjudication is used alone. It is an action for transferring to a personal creditor the real estate of the debtor in satisfaction of the debt—as by a writ of *elegit* in England. It can proceed only on an ascertained and past-due debt. Adjudications commenced within twenty days of the commencement of the first adjudication are conjoined with it, so as to share in its benefits. Those not so commenced must be separately prosecuted; but, if decree is obtained within a year of the first decree, they are entitled to share equally with the first and with each other, called *ranking pari passu*. The lands are redeemable by the debtor within three years, called "the legal"—or within forty years, if the adjudger has not meanwhile obtained decree of foreclosure, called "decree of declarator of the expiry of the legal."

ADJUDICATION IN IMPLEMENT. When an agreement to convey, or a will, or conveyance of real property, is imperfect in feudal form, but good in substance, specific performance may be enforced by the grantee, purchaser, or devisee, by an action styled an adjudication in implement, the decree in which is equivalent to a conveyance.

ADJUDICATION IN SECURITY. This is obtained on a debt not yet due, or uncertain in amount, and only on proof that the debtor is approaching insolvency, or that other creditors are adjudging. It is ranked *pari passu* with other adjudications, but it is redeemable at any time, and cannot be a ground of foreclosure.

ADMINICLE. Documentary (or sometimes parole) evidence in a suit to set up a lost deed. (See *Proving the Tenor*.)

ADMINISTRATION, RIGHT OF. The right of a husband to the interest of his wife's real estate.

ADMINISTRATOR-IN-LAW. The title of father as guardian of his children.

ADVOCATE—Barrister-at-Law. (See *Lord Advocate*.)

ADVOCATION. Appeal, or removal as by certiorari, of an action from an inferior Court to the Court of Session.

AGENT. Solicitors are frequently called law agents, or simply agents.

ALIMENT. Alimony of a wife, or maintenance of a child or imprisoned debtor. (See *Act of Grace*.)

ALLENARLY. Only.

ANNUAL RENT. Interest, generally applied to interest of money on mortgage.

APPARENT HEIR. This term is restricted (except in the Entail Act of 1848) to the heir after the death of his ancestor, but before he has "made up his titles," *i.e.*, completed the feudal title to the estate in his own person. (See *Title to Land*, 2 and 3, c.)

APPREHEND, TO. To arrest.

APPRIISING. The old form of adjudication for debt, *q. v.*

APPROBATE AND REPROBATE, RULE OF. Doctrine of election.

ARRESTMENT. An attachment of money or goods belonging to the debtor, as owing by or in the hands of a garnishee. But it may not only be obtained after judgment, when it is called an Arrestment in Execution, but during the progress of an action, when it is called an Arrestment on the Dependence,—or at the commencement of an action against a foreigner, when the Court has not otherwise jurisdiction over him, and when it is therefore called an Arrestment *ad jurisdictionem fundandam*. In any case it may be "loosed" on application of the debtor, either simply, when it had been improperly obtained, or on the debtor depositing the amount of the debt in Court, or giving security for it. If not loosed the arrestment is carried into effect, on the debt being established, by an action against the holder of the money or goods, called an action of *forthcoming*.

ASSIGNATION. Assignment. In Scotland choses in action may be legally assigned. Intimation to the debtor is necessary to render an assignment valid as against third parties.

ASSOILZIE, TO. To give judgment for the defendant.

AUDITOR. Taxing master.

AUGMENTATION. A suit by a beneficed clergyman for an increase to the living to be decreed out of the tithes in the hands of lay impropriators.

AUTHOR. The party from whom a title is derived.

AVIZANDUM, TO MAKE,—or, TAKE TO. To consider before giving judgment or making an order. To make great avizandum is where a Lord Ordinary in the Court of Session transfers a cause before him to the Inner House. (See *Court of Session*.)

AWARD OF SEQUESTRATION. Adjudication of Bankruptcy.

BACK BOND. A deed executed to limit the operation of an *ex facie* absolute conveyance, *e.g.* declaring it to be in mortgage or trust only.

BAILIE. Alderman in a borough, or steward of a manor.

BAIRNS. Children.

BANK AGENT. Manager of provincial branch of a bank.

BANKRUPT. This word, used alone, properly signifies one whose estates have been sequestrated, *i.e.*, who has been adjudged bankrupt. But it is often used as a contraction for notour (notorious) bankrupt, *i.e.*, one who has committed an act of bankruptcy, but who has not been adjudged bankrupt. All executions levied on the goods of a debtor within two months before, and four months after, his becoming notour bankrupt, are ranked *pari passu*, *i.e.*, held as of the same date, and confer a right to an equal share in the proceeds of the goods in execution. Assignments

and conveyances and securities given to creditors after, or within sixty days before, notour bankruptcy, are voidable by prior creditors, under the Act 1686, c. 5, or at common law if fraudulent. (See also *Conjunct* and *Confident*.)

BARONY. Lands held direct of the Crown with, formerly, privilege of local jurisdiction, &c.

BASE FEE. Land held in sub-infeudation of the vendor.

BEFORE ANSWER. Before deciding the point of law.

BEHAVIOUR AS HEIR. Taking up the inheritance, which involves liability for the predecessor's debts, though beyond the assets.

BENEFIT OF DISCUSSION. The right that a creditor shall not proceed to execution against his debtors, except in the order of their legal liability.

BILL CHAMBER. A permanent Court attached to the Court of Session, in which several forms of action originate; from which writs of execution, injunction, &c., issue, subject to the review of the Court of Session. The junior Judge of the Court of Session sits in the Bill Chamber during the sitting of the Court; in vacation the other Judges sit in it by rotation. The Judge for the time being is entitled the Lord Ordinary on the Bills.

BONA FIDES. No suit for mesne rents or profits lies against a party who held *bona fide* on a title ultimately found bad.

BOND AND DISPOSITION IN SECURITY. The common form of mortgage deed. (See *Title to Land*, 5.)

BOX DAYS. Days appointed in each vacation for the filing of pleadings, &c. in Court.

BURDEN. Incumbrance.

BURDEN, REAL. A charge of money on real estate, or a covenant running with the land.

BURDENS, PUBLIC AND PARISH. Rates and taxes.

BURGAGE TENURE. A peculiar tenure of land in boroughs.

BURGH. A borough holding a charter of incorporation from the Crown.

BURSARY IN A COLLEGE. Exhibition.

CALUMNY, OATH OF. A deposition on oath by a party to a suit (seldom required except from the plaintiff in divorce suits) that he believes he has good cause of action.

CAPTION, LETTERS OF. Writ of ca. sa., now superseded by proceedings on a "*Charge*," *q. v.*

CASE. A written argument ordered by the judge in causes of difficulty.

CASH CREDIT. A current account, limited to a fixed amount, opened by a bank in favour of a party who has given the bank security by mortgage or sureties for the amount.

CASUALTIES. Fines and incidents due to the lord of a manor. (See *Title*.)

CASUS AMISSIONIS. The reason of a deed being lost, evidence of which is generally required before it is allowed to be set up by secondary evidence. (See *Proving the Tenor*.)

CAUTION. Security. **CAUTIONER.** Surety. Actions on this ground are subject to a limitation of seven years.

CERTIFICATION. A formal notice of what will follow in case of default.

CESSIO BONORUM, frequently abbreviated into *Cessio*. A judicial procedure resembling that under the Insolvency Acts. It can be commenced only by a debtor who is or has been under, or is threatened with, arrest. The debtor is examined in Court, after notice to his creditors, and the Court may then pronounce decree of *cessio*, the effect of which is to free the debtor from liability to arrest for any prior debt, and to transfer his whole property, present and future, to a trustee, for payment of his creditors. The income of a benefice, salary of an office, half-pay of an officer, &c., are subject to this decree, such portion only being reserved to the debtor as in the opinion of the Court is necessary for his sustenance.

CHARGE. A writ issued to require payment of a debt or performance of an obligation within a fixed time, called the "days of charge." The charge for debt proceeds only on a decree of a Court, either in a cause, or on a document containing a clause authorising it to be registered in the books of the Court "for execution," which is equivalent to a warrant of attorney to confess judgment. In bills of exchange, such a clause is held as implied. A charge is given (served) by an officer of Court, and the "charger" (person prosecuting it) may proceed to levy his debt upon the goods on expiration of the days of charge. But if he desires to arrest the debtor, he must obtain a further warrant from the clerk of the bills, if the decree was by the Court of Session, or from the sheriff-clerk, if the decree was by the sheriff. Such warrant is granted as of course on proof of service of the charge.

CIRCUMDUCTION OF A TERM FOR PROVING. A judge's order, closing the time for taking evidence in a cause.

CITATION. Service made by an officer of Court, of a writ requiring appearance. In actions, fourteen days must elapse between the citation, when given personally or at the dwelling-house, and the day for entering appearance. This period is called the *induciæ*. When the party to be cited is abroad, he must be cited edictally, *i.e.*, by notice in a register kept for the purpose and published periodically, called the Register of Edictal Citations. No judge's order is required for this, and on the elapse of the *induciæ*, which in this case are twenty-one days, the case proceeds as if personal service had been effected.

CLARE CONSTAT, Precept of. (See *Title to Land*, 3 c.)

COGNITIONIS CAUSA, DECREE. Decree in an action for constituting a debt against the heir of the debtor, made after the heir has disclaimed his right to the succession.

COLLATION. Bringing into hotchpot.

COLLEGE OF JUSTICE. A corporation consisting of the judges, who are senators of it, barristers, officers of the Court, and higher classes of attorneys, which enjoyed some privileges, but never meets.

COMMISSARIES. The old ecclesiastical court, now abolished.

COMMISSIONERS OF SUPPLY. Commissioners of Land-tax, including nearly all the landowners in each county, and exercising the functions of the magistracy in regard to county rates, prisons, &c.

COMMISSIONERS ON A SEQUESTERED ESTATE. Three of the

creditors, elected by the general body of creditors, to advise with the trustee, superintend his proceedings, audit his accounts, fix the amount to be divided at each period, direct the sale of property, fix the amount of the trustee's commission, and perform other similar duties. The office is gratuitous, and from their decisions appeal lies to the Sheriff or Court of Session.

COMMON AGENT. The solicitor elected by the creditors to conduct an action of *ranking and sale*, *q. v.*, or by the heritors in adjusting their several liabilities in an *augmentation*, *q. v.*

COMMON DEBTOR. A person indebted to several creditors, who are suing him at once.

COMMONTY. A Common.

COMMUNION, GOODS IN. The personal property of husband or wife during the marriage not restricted to the separate use of either. They were formerly divisible, in certain proportions, between the children and the survivor on death of either husband or wife—now on death of the husband only.

COMPEARANCE. Appearance.

COMPENSATION. Set-off.

COMPETENT AND OMITTED. An objection to the admission of an averment of fact or law on the ground that it might have been, and ought to have been pleaded at an earlier stage.

COMPETITION. Actions by several creditors endeavouring to establish a preference.

COMPOSITION. Fine paid on purchase to the lord of the manor.

CONCLUSIONS OF AN ACTION. The prayer.

CONDESCENDENCE. Statement made in the summons (*i.e.*, declaration or bill), or afterwards ordered by the Court, of facts, on which an action is founded. It is divided into distinct heads or articles, and the defendant is required either distinctly to admit or deny each. In so far as not expressly denied, each is held to be admitted.

CONDESCEND ON, TO. To make a specific allegation.

CONDITIONAL INSTITUTION. Devise or bequest over in the event of lapse in the settlor's or testator's lifetime.

CONFIDENT PERSON. A person standing in a confidential relation to another, such as law agent, partner, steward clerk, or servant. (See *Conjunct*.)

CONFIRMATION OF EXECUTOR. Probate or grant of administration. (See *Executor*.)

CONJOINING ACTIONS. Consolidating actions.

CONJUNCT PERSONS. Near relatives, as sons or daughters by blood or in law, brothers and sisters, uncles or nephews, &c. Voluntary conveyances or assignments to a *conjunct or confident person* by a party insolvent at the time are voidable by prior creditors for valuable consideration, under the Act 1621, c. 18.

CONJUNCT RIGHTS. Joint Rights. Unless restricted by some further word, conjunct rights of fee in the husband and wife belong to the husband alone in fee, the wife having only a life estate. Conjunct rights given

to a father and unborn children, carry the whole fee to the father, unless words are added expressly limiting the father's estate to his life only. Where the children are born and named in the conveyance of the conjunct right, they take a joint estate with the father in fee.

CONQUEST. Estate acquired by purchase as distinguished from descent.

CONSIGNATION. Depositing money, the subject of a suit, commenced or threatened, in Court, or in a bank.

CONSOLIDATION. Merger of the estates of the lord and of the tenant of an estate of inheritance.

CONSTITUTION, ACTION OF. An action by a creditor to fix the amount of his debt, so as to render the real estate liable in the hands of the heir.

CONTINUATION. Adjournment or enlargement of time.

CONTRACT. There is no distinction in Scotland between simple contracts and specialties. Most contracts relating to personal property may be parole. No consideration is requisite to support a promise, whether verbal or written.

COUNT AND RECKONING, ACTION OF. Suit for an account.

COURTESY. Curtesy.

COURT OF SESSION. The Supreme Civil Court of Scotland. It consists of thirteen Judges, or "Lords of Session," and is divided into the Outer and Inner House. Five Judges, called Lords Ordinary, constitute the Outer House, each of whom sits separately, and before any one of whom most actions may be commenced. Unless it is of unusual difficulty, in which case the Lord Ordinary may "report" (transfer) it to the Inner House, he hears it fully and pronounces judgment. Against the judgment an appeal lies to the Inner House. The Inner House sits in two Divisions, the First and Second, four Judges sitting in each, and each Division being of co-extensive and independent jurisdiction. In very difficult cases either Division may consult the other Judges, or order the case to be heard before the whole Judges, which is called a "Hearing in presence," and the case is then decided by the opinion of the majority. From either Division an appeal lies only to the House of Lords. Appeals to the Court of Session from inferior Courts may generally be taken either before one of the Lords Ordinary (whose decision in that case is final), or before either Division of the Inner House. In all cases the plaintiff or appellant selects the Lord Ordinary and the Division to which the cause is to be attached.

CRUIVES. A method of salmon fishing in rivers by forming an enclosure with stakes.

CURATOR AD LITEM. Next friend or guardian in a suit.

CURATOR BONIS. A manager or receiver appointed by the Court of Session, where the owner is under some legal incapacity to act for himself.

CURATOR OF A MINOR. Guardian during minority, *i.e.*, the period from the age of fourteen (or twelve, if a girl) to twenty-one. If the father has not appointed a curator, the minor may do it himself, but he cannot be compelled to do it, nor can the Court appoint one for him. (See *Tutor* and *Minor*.)

CURATOR OF LUNATIC. Committee.

- DEAN OF FACULTY.** The chief of the bar, elected annually, but practically for life or till promotion to the Bench, by the whole body of the bar, or Faculty of Advocates, *q. v.*
- DEAN OF GUILD.** A borough officer charged with superintendence of buildings.
- DEATHBED, LAW OF.** Voluntary deeds relating to real estate executed within sixty days of death, by a person at the time labouring under the disease of which he afterwards dies, unless after the execution he is proved to have been seen publicly at church or market, are voidable by the heir at law by an action of reduction, *ex capite lecti*.
- DEBITUM FUNDI.** A charge upon land.
- DECERN, TO.** To decree. **DECERNITURE,** decree.
- DECLARATOR.** An action to declare a right. It may either be for that purpose alone, or contain a prayer for relief.
- DEEDS.** These in Scotland are not sealed, but must be signed on every page by the parties, and on the last page the signatures must be attested by those of two male witnesses, whose names and designations, together with the name and designation of the person who wrote the deed, must be stated in the "testing clause" (attestation). In the same place must be stated the number of pages of which the deed consists, and the date when and place where executed. When the necessary formalities above mentioned are complied with, the deed is said to be *probative*, *i. e.*, it proves itself, unless an action is brought to set it aside on some legal ground. Holograph deeds, *i. e.*, those written wholly by the hand of the grantor, are also privileged to the extent of being admitted without the attestation of witnesses, except as to the date of execution, which, when material, must be proved otherwise. A deed cannot be subscribed by a mark; but when the party cannot write, it must be subscribed for him in his presence by two notaries, and before four witnesses. There is no distinction resembling that between deeds poll and indentures, but a deed poll is sometimes called a unilateral deed. (See *Erasures*.)
- DEFAULT, DECREE BY.** Taking the summons *pro confesso* for default of some pleading.
- DEFENDER.** Defendant.
- DEFORCEMENT.** Rescue or violent resistance to an officer serving process of a court.
- DELETE, TO.** To expunge.
- DELIVERANCE.** Decree or order of a judge.
- DEMISSION.** Resignation.
- DENUDE, TO.** To divest or reconvey.
- DEPONE, TO.** To depose.
- DESTINATION.** Limitation of an estate.
- DEVOLUTION.** The passing over of a base or conditional estate.
- DIET.** Sitting of a Court, or day appointed for performing some judicial act.
- DILIGENCE.** Mesne or final process against the person or estate. Applied to witnesses, &c., it signifies a judge's order in the nature of a subpoena. To do diligence on a bill is to issue execution upon it, which may be done without an action.

DISPONE, TO. To convey by deed or devise.

DISPOSITION. Deed of Conveyance. It may signify a will of real property, for in Scotland real property cannot be devised by a will proper, but can only be devised by a conveyance framed to take effect on execution, but which is valid, though not delivered before death.

DOMINANT TENEMENT. The estate to which an easement is appurtenant, or appendant.

DOMINIUM DIRECTUM, or UTILE. The estate remaining in the superior lord after grant by him to a vassal in fee is the dominium directum. The vassal's estate is the dominium utile.

DOORS. The Sheriff may grant warrant to break open doors in executing writs.

DOUBLE. A copy of a judicial writ left with the person served.

EDICTAL CITATION. (See *Citation*.)

EFFEIRING TO. Legally apportioned to, as interest of a debt; share of profits to a partner. As *EFFEIRS*, as law directs.

EIK. Addition. **EIK TO A CONFIRMATION,** further return for probate duty.

ENTAIL. Under a strict Scottish entail, made prior to 1848, the tenant in possession had never more than a life estate only, and consequently could not bar the entail. He may now do so with the consent of one or more of those in remainder. If born after 1848, or after the execution of any entail made subsequently, he may bar it without any consent. To make an entail effectual, it must have contained clauses *prohibitory* against the possessor selling, encumbering, or anew limiting the estate, *irritant* (avoiding) of any such acts, if he should do them, and *resolutive* (forfeiting) of his right to the estate in that case. These three sets of clauses constituted the fetters of a strict entail. Defect in any one avoided the entail as regards the particular procedure, whether selling, encumbering, or devising; but now it avoids the entail in all respects.

ERASURES. Words in a deed or other document written on erasures, are taken *pro non scriptis*, but if in a material clause, they may vitiate the whole document. When words are purposely erased, the fact, and the number of the words erased, must be stated in the attestation clause. Words to be inserted must be written on the margin, and attested by the signatures of the parties, the Christian names preceding and the surnames following the marginal note.

ESTATE. This word in Scotland has the ordinary sense, not the technical sense in which in England it is applied to real property.

EVICION. Ejectment for default of title.

EXCAMBION. Exchange of lands.

EXCEPTION. Special plea (at common law).

EXECUTION. Certificate of service, returned by the officer of Court by whom the service was made. (See *Citation* and *Charge*.)

EXECUTION, REGISTRATION FOR. In deeds a clause authorising registration in the books of the Court of Session for execution, is equivalent to a warrant of attorney to confess judgment, and the registration is equi-

valent to entering up judgment. Bills of exchange may be registered for execution after being protested for non-payment.

EXECUTOR. Signifies both executor and administrator. One who would in England be called executor, is in Scotland called executor nominate. An administrator is called executor dative. In default of confirmation as executor by any one else, a creditor may be confirmed to the extent of obtaining payment of his debt, and is then called executor creditor. An executor is bound to pay debts and legacies six months after the death. The word executors used generally signifies next of kin. **EXECUTRY.** Personal estate of a person deceased.

EXPEDE, TO. To sue out (a writ); to execute (a deed).

EXPENSES. Costs.

EXTRACT. An office copy of a decree or writ. **BEFORE EXTRACT;** before a decree is entered.

EXTRACTOR. The officer appointed to give extracts.

FACILITY. Weakness of mind not amounting to imbecility.

FACTOR. An agent. The steward of an estate. A manager appointed by trustees. **JUDICIAL FACTOR,** a receiver appointed by the Court of Session.

FACULTY. Power.

FACULTY OF ADVOCATES. The members of the bar, who possess a common library, and meet annually to elect officers, and at intervals, as required, to discuss legal reforms or professional questions.

FATUOUS PERSON. Idiot.

FEU. A freehold held of a superior lord. In Scotland the feudal system is still in full force with respect to land, and subinfeudation is permitted to any extent. **FEU RIGHT,** is the estate of the vassal. **FEU CONTRACT,** or **CHARTER,** or **DISPOSITION,** the deed by which the superior grants the vassal's estate. **FEU DUTY,** rent service. **FEUAR,** vassal. (See *Title to Land*.)

FIAR. Holder of an estate in fee simple, as distinguished from an estate for life.

FIARS PRICES. Average prices of grain ascertained in each county every year by the Sheriff and a jury, by which the rates of commutation of tithes and of such rents as are expressed in grain, are determined.

FORCE AND FEAR. Duress.

FORO, DECREE IN. Decree made after appearance and pleading.

FORTHCOMING. An action brought against the person in whose hands money or goods have been arrested (see *Arrestment*), to obtain their transfer to the creditor who arrested, in satisfaction of the debt due to him by their owner.

FREEHOLD in Scotland means technically only the estate of a tenant holding of the Crown *in capite*.

FUGITATION. Outlawry.

FUNGIBLES. Goods consumed by use, as corn, &c.

FURIOUS PERSON. A lunatic.

GRASSUM. Fine paid at the commencement of a lease.

GRATUITOUS. Without consideration.

GROUND ANNUAL. Perpetual rent-charge.

- HABIT AND REPUTE.** Common reputation, or commonly reputed.
- HÆREDITAS JACENS.** The estate which belonged to a person deceased, before the heir has made up his title to it. (See *Title to Land*.)
- HAYER.** A witness having documents in his possession which are to be used in evidence.
- HEARSAY EVIDENCE.** This is admitted in Scotland (in addition to the cases in which it is received in England), in the case where the words repeated were used by a person who is dead, at the time of the trial, but who would, if in life, have been an admissible witness.
- HEIR PORTIONER.** Female Coparcener.
- HEIRS.** Heirs render themselves personally liable for the whole of their ancestor's debts, if they take the inheritance without reservation. For the purpose of inquiring whether the estate is more in value than the debts, they are allowed a year, called the *annus deliberandi*, after which the superior may compel them either to *enter*, or a creditor make them liable, or they must renounce the inheritance. (See *Title to Land*, 4.) An heir may enter *cum beneficio inventarii*, i.e., he may file an inventory of the estate, and declare that he is to be no further liable for the ancestor's debts than to the value of the estate.
- HEIRSHIP MOVEABLES.** The best articles of furniture and of farming stock, to which the heir, and not the executors, succeeds.
- HERITABLE.** Real. **HERITAGE,** real estate. These terms are opposed to *moveable*, and *moveables*. The distinction is, in the main, the same as between Real and Personal, with the important exception that leases and mortgages are accounted heritage.
- HERITABLE BOND.** Mortgage of land.
- HERITOR.** Landowner.
- HOLDING.** Tenure.
- HOMOLOGATION.** Consent or adoption.
- HORNING, LETTERS OF.** A writ commanding a debtor to pay or perform his obligation, under pain of being "put to the horn," i.e., proclaimed rebel. It is now superseded by a *charge, q. v.*
- HYPOTHEC.** Landlord's or superior's right of distress. The superior's is for the amount of the *feu-duty*, and has priority over the landlord's. The landlord's hypothec extends over the crop for the rent of the year in which it was grown, and over the stock on the farm for the current year's rent. (See *Sequestration for Rent*.) In the case of houses, &c., the landlord has a hypothec on the *invecta et illata*, i.e., the household furniture of his tenant. The law agent's hypothec is a solicitor's lien over title-deeds.
- IMPLEMENT.** Fulfilment or performance.
- IMPROBATION.** Avoidance of a deed on proof of forgery, or of other legal ground.
- INDUCLÆ.** Period allowed for appearance after service.
- INEPT.** Ineffectual.
- INFESTMENT.** Livery of seisin. (See *Title to Land*.)
- INHIBITION.** A writ obtainable by a personal creditor, prohibiting the debtor from selling his lands, or further incumbering them with debt.

The writ must be served on the debtor, and afterwards registered in a public register kept for the purpose. The creditor suing it out may set aside any deeds afterwards executed in defeasance of the right it gives him.

INSTITUTE. The person first named in a new limitation of an estate. He may be the settlor himself.

INSTRUCT, TO. To prove.

INTERDICT. Injunction.

INTERDICTION. A legal guardianship, either by authority of a Court, or by voluntary deed, on a person of weak mind, though not insane, in regard to the management of his real property.

INTERLOCUTOR. Any decree or judgment of a Court.

INTROMISSION. Acts of management. To **INTROMIT WITH**; to assume management of. **VITIOUS INTROMISSION**; an act which constitutes a party executor *de son tort*.

INVECTA ET ILLATA. Furniture or goods subject to the landlord's right of distress, or grain brought within the manor liable in suit to a mill.

INVESTITURE. The completed title to land. (See *Title to Land*, 2, 4.)

IRRITANCY. Condition of forfeiture or nullity.

ISH. Expiration. Also egress.

JUS CREDITI. A right on which action may be brought.

JUS MARITI. The husband's right of property in the personal estate of the wife, whether belonging to her at the time of the marriage or acquired during coverture. It extends even to the wife's property, not reduced to possession during the marriage.

JUS RELICTÆ. The third of the personal estate of the husband and wife, to which, in default of a settlement, the widow has right, when the husband has left children. When there are no children, the *jus relictæ* is one-half of the personal estate.

JUSTICIARY, COURT OF. The Supreme Criminal Court.

KIRK. Church.

LAW AGENT. Solicitor.

LEASE. It must be remembered that a leasehold for years is heritable, *i.e.*, part of the real estate.

LEGITIM. A portion of his personal estate which a father cannot by will leave away from his children. Where he leaves a widow, the legitim is one-third of the personal estate; where he does not leave a widow, it is one-half. It is divided equally among the children alive at the father's death, excluding the heir-at-law, unless he choose to collate, *i.e.*, bring the real estate into hotchpot.

LEGITIMATION. The rendering a bastard legitimate by subsequent marriage of his parents.

LETTERS. Often signify a writ.

LIEGE POUSTIE. Good health. Used generally in answer to an objection to a deed as granted on *deathbed*, *q. v.*

LIFERENT. An estate for a person's own life.

- LIQUID.** Liquidated or ascertained in amount.
- LITIGIOSITY.** Being subject to the rule of *lis pendens*.
- LOCALITY.** A suit for determining the liability of the several owners of tithes to contribute to an augmentation, *q. v.*
- LOCALITY, WIFE'S.** Jointure lands.
- LOCATION.** The contract of hiring.
- LOCUS PŒNITENTIÆ.** Period within which a contract not acted on may be renounced.
- LORDS OF COUNCIL AND SESSION.** Judges of the Court of Session.
- MAGISTRATE.** Generally restricted to the provost and bailies (mayor and aldermen) of boroughs.
- MAILLS AND DUTIES.** Rent. **ACTION OF.** An action for compelling attornment of tenants.
- MANDATE.** A power of attorney. **MANDATORY,** one holding a mandate. **MANDANT,** one granting a mandate.
- MANDATORY IN AN ACTION.** A person who becomes security for costs on behalf of a suitor residing out of Scotland. A mandatory must be sisted (joined as party) by every suitor in such circumstances.
- MANSE.** Parsonage-house.
- MARCH.** Boundary between estates.
- MEDITATIO FUGÆ WARRANT.** Writ of *ne exeat regno*. Generally applied for to the sheriff of a county.
- MELIORATIONS.** Improvements by a tenant.
- MEMORIAL.** Case for opinion of counsel, or instructions for counsel.
- MESSENGER-AT-ARMS.** An officer of the Court of Session, whose duty is to serve summons and execute writs.
- MINISTER.** Parish clergyman, as well as dissenting clergyman.
- MINOR.** A person between the age at which pupillarity ceases (fourteen in boys, twelve in girls), and majority. Minors in trade are liable for trading debts, and all minors are liable to perform their contracts, unless they can prove *lesion*, i.e., damage arising from the contract, in which case they may be relieved against it within four years after majority, a period called the *quadriennium utile*. But in no case will they be relieved against a debt contracted for value, except in so far as both parties can be restored. Minors without curators (guardians) may contract as validly as minors who have curators, and whose curators give their consent. Such consent does not validate an injurious contract.
- MINUTE IN AN ACTION.** A written statement of some fact, or proposal, not set forth in the regular pleadings.
- MINUTE OF DEBATE.** A written argument ordered by the Court in cases of difficulty.
- MISSIVES OR MISSIVE LETTERS.** Memorandum of agreement.
- MODIFY.** To fix a sum.
- MORA.** Undue delay, laches.
- MORTIFICATION.** A charity or an estate in mortmain. To **MORTIFY**, to grant in mortmain.
- MOVEABLES.** Personal estate. (See *Heritable*.)

MULTIPLEPOINDING. Interpleader suit. It may, however, be also brought by one of the claimants, called then the real raiser, in the name of the holder of the fund, called then the nominal raiser. It may in some cases be brought, although the claimants have not proceeded to execution against the debtor. The fund which is in dispute is called the fund in medio.

MULTURES. Mill dues.

NARRATIVE IN DEEDS. Recitals.

NIMIOUS. Unnecessary and oppressive.

NOTOUR. Notorious. (See *Bankrupt*.)

OATH. Frequently signifies deposition on oath; or affidavit. (See *Reference to Oath*.)

OATH IN SUPPLEMENT. The evidence of the plaintiff, received in some cases as conclusive after he has proved a *prima facie* case.

OBLIGATION. Contract or covenant.

ONEROUS. For valuable, or good, consideration.

OVERSMAN. Umpire.

PARTS AND PERTINENTS. Appurtenances.

PERSONAL EXCEPTION. Estoppel.

POINDING. Execution under a *fi. fa.* **POINDING OF THE GROUND;** Distress by a mortgagee.

PRECEPT. Writ. (See *Title*.)

PRECOGNITION. In a criminal case, the depositions; in a civil case, the proofs taken by an attorney for the use of counsel. To **PRECOGNOSCE**, to take such proofs.

PRESCRIPTION, NEGATIVE. Limitation of actions. In most cases, however, the action is not absolutely barred, but the plaintiff, after the period limited, is restricted to proof of his claim by writing under the hand of the defendant, or by the defendant's admission on oath. Merchants' and tradesmen's accounts fall under the rule in three years, parole contracts in five, bills in six, covenants by sureties in seven, bonds unattested in twenty, and other covenants in forty years, called the long prescription, and which extinguishes the right.

PRESCRIPTION, POSITIVE. An indefeasible presumption in favour of a title to land which has been complete, in a feudal sense, and has formed the ground of possession for forty years.

PRIVILEGED DEBTS. Debts having a priority. The principal are deathbed and funeral expenses, and wages of servants, &c. There is no distinction between specialty debts and debts by simple contract.

PROBATIVE. A document which proves itself is *probative*. (See *Deed*.)

PROCESS. An action at law. In a restricted sense, the pleadings and documentary evidence filed in court in an action.

PROCURATOR. An agent. In a suit the counsel or solicitor conducting it is called the party's procurator. Local attorneys in the Sheriff Courts are called Procurators of Court.

PROCURATOR-FISCAL. The local attorney who acts as public prosecu-

tor in cases tried in the local Courts, and as local attorney for the prosecution in cases tried in the Court of Justiciary.

PROCURATORY. Warrant of attorney.

PRODUCTIONS. Documents or exhibits produced as evidence in a cause.

PROPELLING THE FEE. Conveyance by tenant in tail to the next in remainder.

PROROGATION. Enlargement of time, or submission to jurisdiction.

PROTESTATION. Application to have a suit dismissed for want of prosecution.

PROUT DE JURE. In every way which law permits.

PROVING OF THE TENOR. An action for setting up a lost deed.

PROVISION, HEIR OF. Devisee, immediate or in remainder.

PROVOST. Mayor.

PUPIL. A boy under fourteen or a girl under twelve years of age. (*See Tutor.*)

PURIFICATION. The happening of a contingency.

PURSUE, TO. To sue. PURSUER, plaintiff.

RANKING AND SALE. An action by a mortgagee in possession or an adjudger (*see Adjudication*), or by the heir, for having the estate of the debtor or ancestor sold, and the price applied in payment of the debts of the creditors, according to their legal priorities.

RANK, TO. To admit proof of a debt. To RANK ON; to prove against, the estate.

RATIFICATION. Acknowledgment of a deed by a married woman.

RECLAIM, TO. To appeal from a Lord Ordinary to one of the divisions of the Inner House of the Court of Session. It must be within twenty-one days in ordinary actions.

RECLAIMING NOTE. A note of appeal in such a case.

RECONVENTION. The rule by which a foreigner suing in Scotland renders himself liable to a counter-action by the defendant.

RECORD, CLOSING THE. A Judge's order declaring the pleadings concluded, and the case ready to be set down for hearing.

RECORD, TO. To enter a deed in a public register.

REDUCTION. An action for "reducing," *i.e.*, cancelling a deed, or will, or setting aside a decree of a Court. In a "reduction improbatum" the deed, &c., is set aside if not produced, as fully as if produced and proved invalid.

REFERENCE TO OATH. A reference of the facts involved in a suit, made by one of the parties, to the oath of the other. It may be made at any stage by either party. The oath, when given, is decisive of the fact referred, and excludes all other proof prior or subsequent. The oath is said to be either affirmative or negative, according as it affirms or denies the fact in question, but sometimes it is *qualified*, *i.e.*, the party to whom the reference is made does not simply swear yes or no to the question, but adds circumstances relating to it. In this case the Court has to decide whether the circumstances are such as form a necessary part of the oath, or whether they are properly extraneous. In the former case they are called *intrinsic*, and are received; in the latter case they are called *extrinsic*, and the oath is read without them.

REGISTRATION, CLAUSE OF. Warrant of attorney to confess judgment contained in a bond.

REI INTERVENTUS. Part performance.

RELEVANT. Pertinent. RELEVANCY, OBJECTION TO. Demurrer.

RELIEF. Fine paid by an heir to the lord on admission. (See *Title to Land*.) Also the right of indemnity over against a third party.

REMISSIO INJURIÆ. Condonation.

REMIT. Transmission of a cause to another Court of equal or inferior jurisdiction, or reference to an individual to make an inquiry needed for the information of the Court.

REMOVING, ACTION OF. Ejectment by a landlord.

REPEATING A SUMMONS. Instituting a cross suit for the purpose of establishing a defence which could not be stated in the original cause.

REPEAT, TO. To repay.

REPETITION. Repayment.

REPROBATOR. Evidence to impeach a witness's credibility.

REPONE. To replace. In an action it is to set aside a decree in *absence*, or by *default*, and to direct the cause to be proceeded with as if such decree had not been made.

REPORT, TO. Besides its ordinary sense, signifies transference by a Lord Ordinary of a cause before him to the Inner House, without giving any judgment on it himself. (See *Court of Session*.)

RESCISSORY ACTION. Action of reduction, *q. v.*

RESIGNATION OF AN ESTATE. Surrender by the tenant of a freehold to the lord, either for the admittance of another as purchaser, in which case it is called resignation in favorem, or to remain in the lord's hands, called then resignation ad remanentiam. (See *Title to Land*.)

RESILE. To withdraw or refuse to complete.

RES NOVITER VENIENS AD NOTITIAM. Matter discovered subsequently to pleading, which may in certain cases be admitted by leave of the judge.

RETOUR. Verdict of heir's propinquity in a service, *q. v.*

RETROCESSION. Re-assignment by the assignee to the assignor.

REVERSION. Equity of redemption.

RIDING CLAIMS are those made in a multiplepoinding by creditors of the creditors who are the immediate claimants. If the riding claims are established those making them obtain payment from the Court, out of the fund to which their debtor is ultimately found entitled.

ROLLS OF COURT. Cause lists or papers.

ROUP. Sale by auction.

RUBRIC. Marginal abstract of a report.

RUNNING LETTERS. Under the Act 1701, c. 6, a prisoner committed for trial may "run his letters," *i. e.*, apply to the Court of Justiciary for an order that his trial shall be fixed within sixty days, after which it must be brought to a close within thirty days more, and in default of either condition, the prisoner may obtain his liberty. He cannot be again committed, except on express order of the Court; and if not then tried within one hundred days, he is free from further proceedings.

RUNRIG. Lands possessed by the owners in alternate strips.

SALE. It may be mentioned that writing is not necessary to prove a sale except in the case of real property and ships.

SASINE. Seisin. (See *Title to Land*.)

SCHEME. A statement drawn up to show a proposed arrangement.

SEDERUNT. Sitting. Persons present at a meeting. **SEDERUNT BOOK** ; Minute book. **ACT OF SEDERUNT** ; General order or rule of the Court of Session.

SEMPILENA PROBATIO. *Prima facie* proof in a filiation case, or action of debt, admitting the mother's, or creditor's oath, in supplement, *q. v.*

SEQUESTRATION. Adjudication of Bankruptcy. Also the appointment by the Court of a receiver of the rents and profits of an estate pending litigation of the title. **SEQUESTRATION FOR RENT** ; Distress by a landlord.

SERVICE OF HEIRS. Procedure taken before the Sheriff of a county or the Sheriff of Chancery in Edinburgh for obtaining a decree declaring an heir to have proved his title to succeed, and which is necessary before he can exercise the full rights of property. Fifteen days' public notice of the application must be given. Any rival claimant may oppose, and any party may carry the case by appeal to the Court of Session, where, if necessary, a trial by jury may be had. General service is service to an ancestor not feudally seised. Special service is service to an ancestor whose feudal title was complete at his death. (See *Title to Land*, 2, 4.) Service may be either as heir general, heir of provision (devisee), or otherwise, according as the estate happens to be limited.

SERVIENT TENEMENT. The estate out of which an easement is granted. (See *Dominant*.)

SERVITUDE. Easement.

SHERIFF. The judge of the county civil and criminal court. Till recently he was called the Sheriff-Depute. He resides in Edinburgh, and must be in habitual attendance on the Court of Session, but holds frequent courts in his county. He has the power of appointing one or more Sheriff-Substitutes, according to the size of the county. These are constantly resident in the county, and hold daily courts, except in vacation. The procedure resembles that in the Court of Session (see *Action*); in most cases it is commenced before the Sheriff-Substitute, and appeal may be taken to the Sheriff. This is done by filing a note of appeal, when the pleadings and documentary evidence, together with the Sheriff-Substitute's notes of the evidence taken orally before him, and his decree, are transmitted to the Sheriff, who gives his decision after argument, sometimes oral, but generally in writing. Both the Sheriff and Sheriff-Substitute must in the decree state the facts which they find proved, and they add a note containing the reasons for their judgment. The Sheriff's jurisdiction is unlimited in actions respecting personal property, and in many actions affecting real estate, but he cannot try questions affecting title to real property, or rescissory or declaratory actions. In actions above £25 in value an appeal lies to the Court of Session ; under that value there is no appeal. The Sheriff's criminal jurisdiction extends to all crimes, ex-

cept those for which the punishment is transportation. Besides his proper civil and criminal jurisdiction many administrative duties are imposed on the Sheriff. (See also *Small Debt Court*.)

SHERIFF-CLERK. Clerk of the Sheriff's Court.

SIGNET, WRITERS TO THE. A class of solicitors practising before the Court of Session, distinguished by the letters W.S. after their names. They also act as conveyancers, and are solely entitled to prepare certain writs which pass the royal signet, whence their name.

SINGULAR SUCCESSOR. Purchaser.

SIST, TO. To stay (procedure or execution). To sist in an action is to join as plaintiff or defendant.

SMALL DEBT COURT. A Court held by the Sheriff for the trial of cases under the value of L.12, and by Justices of the Peace for cases under the value of L.8. The procedure resembles that by plaint in a County Court, and the judge's decision is final.

SOLICITORS BEFORE THE SUPREME COURT. A class of solicitors practising before the Court of Session, distinguished by the initials S.S.C. Solicitors, or writers simply, form another class, but cannot practise except in the local Courts. (See *Signet, Writers to the*.)

SPUILZIE. Illegal and forcible seizure of goods.

STEELBOW. The straw, stocking, or implements on a farm taken by the tenant at entry without payment, and for which at removal he leaves articles equal in quantity and quality. Not a general custom.

STIPEND. Salary of the clergy in lieu of tithe. It varies according to the price of grain in each year, determined by the fiars, *q. v.*

SUBJECTS. Parcels, or premises.

SUBMISSION. Extrajudicial reference to arbitration.

SUBSTITUTE. Remainderman.

SUBSTITUTIONS. Remainders.

SUMMONS. The writ by which an action is commenced. (See *Action*.)

SUPERIOR. Feudal seignor or lord. (See *Title to Land*.)

SUSPENSION. An action for staying procedure on a decree of an inferior Court, or a decree of the Court of Session made in absence of the defendant. The decree itself comes to be reviewed in this form. It is commenced by the presenting of a note of suspension, or petition, in the Bill Chamber. The party who is plaintiff in this action is called the suspender. The defendant is called the charger, being the party whose *charge* is sought to be suspended or stayed.

TACK. Lease.

TAILZIE. Entail.

TEINDS. Tithes.

TENANT. This term is restricted to a lessee.

TERCE. Dower.

TERM-DAY. Quarter-day. Rent, interest, &c., are commonly payable half-yearly, and usually at the terms of Whitsunday, 15th May, and Martinmas, 11th November, sometimes at Candlemas, 2d February, and Lammas, 2d August.

TESTAMENT. Will of personalty. It must be authenticated in like manner as a *deed*, *q. v.* Land cannot pass by testament, but only by words of present conveyance.

TESTING CLAUSE. Attestation Clause. In this clause are expressed the facts necessary to make a deed *probative*. (See *Deed*.)

THIRLAGE. Obligation to do suit to a mill.

TITLE TO LAND. Subinfeudation never having been prohibited in Scotland, the feudal system is still (modified by the system of registration of deeds) the basis of the title to real property. The following are the leading principles of the system :—

1. All land is held primarily of the sovereign as superior. The vassals of the Crown may by subinfeudation be the superiors of others, these others may be superiors to others still, and so on ad infinitum. Each tenant is called the vassal of his immediate superior, and has no concern with any higher superior. The estate remaining in any superior is called the superiority. Practically its value consists in the feuduty (rent-service) paid by the vassal, and in the right to certain fines, called casualties, on alienation, or succession to the vassal's estate.
2. The title of every tenant (whether arising by grant, purchase, settlement, or inheritance) requires infeftment (livery of seisin) to make it complete. This infeftment proceeds on a warrant, called a "precept of sasine," granted either by the immediate superior, or by the vendor, and confirmed by the superior. In either case it implies in fact that the superior recognises the vassal's title, and the necessity of this recognition secures the superior, and the other vassals, from any invasion of their rights by the vassal selling or succeeding. But the superior cannot refuse to recognise the alienation when properly effected.
3. The precept of sasine is contained in the following deeds :—
 - a. When the superior grants an estate for the first time, it is contained in the deed of grant, called an original charter.
 - b. When a vassal conveys to another party, it is contained either in a "charter of resignation," which the superior grants to the new vassal, on the old vassal resigning the lands to him for that purpose (exactly as in surrender and admittance to copyholds), or in the vendor's disposition (conveyance), of which a "charter of confirmation" is afterwards obtained from the superior. These charters on transmission are called "charters by progress."
 - c. When a vassal dies and his heir succeeds, it is contained in a "precept of clare constat," granted by the immediate superior, which sets forth that the heir's proximity has been clearly shown to the superior. Although he may grant this of his private knowledge, he is not bound to do so till the heir has "*served*," *i.e.* proved his proximity before a judge. (See *Service*.)
 - d. In a few cases it is contained in the decree of Court by which

the title of the party is established. In such cases the sasine taken must be confirmed by the superior, to put the party taking it in the situation of his vassal.

4. Till recently, infeftment or sasine, in obedience to the precept of sasine, was given on the land by symbolical delivery, and a deed was drawn up, called an Instrument of Sasine, which recited that it had been done. The actual ceremony is now abolished, but the deed may be used. It is "recorded," *i.e.*, registered in the General Register of Sasines at Edinburgh, or in the Particular Register of Sasines in the county in which the estate is situated. This completes the tenant's title. The procedure is called "making up titles," or "entering with the superior." Sasines have priority according to the date of registration, not of execution, and this rule is not affected by notice of an unregistered sasine, though of earlier date. Thus the registers give complete information as to the person who at the moment has a good title to the estate.
5. Mortgages, styled in general "bonds and disposition in security," are regarded as strictly what their name and form import, *viz.*, a covenant for repayment of the money borrowed, with a conveyance of the lands in security of payment, redeemable by payment, but irredeemable in the event of sale under a power contained in the deed to that effect in default of payment. The deed is registered in the Register of Sasines, which makes it a charge upon the lands, and such deeds have preference according to priority of registration. The mortgage is transferred, transmitted, or extinguished by short entries in the same register. Thus every purchaser or incumbrancer has notice of all existing valid incumbrances, while the incumbrances never affect, legally or equitably (until a sale has actually taken place), the title to the estate itself. The title-deeds remain in the mortgagor's hands, and a second or subsequent mortgage is (within the value of the estate) as easily obtained as a first.
6. Capital sums and rent-charges appointed as jointures, portions, &c., are secured in a similar manner, by the appointment being contained in a deed which is entered in the Register of Sasines. They then form a debt directly charged upon the lands, in whose hands soever they may be, and do not require the intervention of a term for their security.

The changes introduced in this system by recent Statutes, consist in allowing registration of a deed of conveyance itself, instead of the instrument of sasine, to operate as infeftment and registration at once, in substituting short writs for precepts, &c., and in allowing a subsequent deed to refer to the parcels, limitations, &c. contained in a prior registered deed, instead of repeating them.

TOCHER. Dowry or marriage portion.

TRANSACT, TO. To settle a dispute by arbitration or other non-judicial course.

TRANSFER, TO. To revive a suit abated by death of the defendant.

TRANSLATION. Transference of an assignment.

TRUSTEE IN A SEQUESTRATION. Trader's assignee in bankruptcy.

TUTOR. Guardian during pupillarity. When appointed by the father, he is called tutor nominate. When none has been appointed by the father, the nearest male relative on the father's side is entitled to the custody of the pupil's estate, and is called the tutor at law, while the nearest relative through the mother receives the custody of the pupil's person. A tutor dative is named by the sovereign where no tutor at law has applied for the office. A tutor has full control over the pupil's property, except that he cannot sell his real estate. But his accounts must be submitted to a public officer appointed to audit them, and he is subject to the control of the Court of Session.

UPLIFT, TO. To receive and get in.

UPSET PRICE. Sum fixed as that at which the biddings at an auction are to commence, and under which the sale will not take place.

VASSAL. The tenant of a freehold under a seignor or superior. (See *Title to Land*.)

VERGENS AD INOPIAM. Approaching insolvency. This state authorises creditors to take some steps for their security which are not otherwise permitted.

VERITY, OATH OF. Affidavit of a fact, not merely of belief.

VIOLENT PROFITS. The mesne rents, sometimes by way of penalty estimated at double the actual rents, to which a tenant resisting an ejectment is liable.

WADSET. Old form of mortgage.

WAKEN, TO. To revive a suit abated by want of prosecution for a year.

WARRANTICE. Warranty or covenant for title.

WILL OF SUMMONS, &c. The part containing the warrant of service.

WRONGOUS IMPRISONMENT. False imprisonment. Under the Act 1701, c. 6, magistrates and officers issuing or executing illegal warrants of imprisonment, or acting without warrant, are liable in damages. (See *Running Letters*.)

WRIT. Writing.

WRITER. The usual name of country attorneys.

WRITER TO THE SIGNET. (See *Signet*.)

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